No. 16-1067	
Title:	**Charles Murphy, Petitioner** v. **Robert Smith, et al.**
Docketed:	March 6, 2017
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Numbers:	(15-3384)
Decision Date:	December 21, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 02 2017	Petition for a writ of certiorari filed. (Response due April 5, 2017)
Mar 30 2017	Waiver of right of respondent Robert Smith, et al. to respond filed.
Apr 03 2017	Brief amici curiae of Roderick and Solange MacArthur Justice Center, et al. filed.
Apr 12 2017	DISTRIBUTED for Conference of April 28, 2017.
Apr 12 2017	Response Requested. (Due May 12, 2017)
Apr 25 2017	Order extending time to file response to petition to and including June 12, 2017.
Jun 14 2017	Order further extending time to file response to petition to and including July 12, 2017.
Jul 12 2017	Brief of respondents Robert Smith, et al. in opposition filed.
Jul 18 2017	Reply of petitioner Charles Murphy filed.
Jul 26 2017	DISTRIBUTED for Conference of September 25, 2017.
Aug 25 2017	Petition GRANTED.
Sep 05 2017	Motion to dispense with printing the joint appendix filed by petitioner Charles

	Murphy.
Sep 29 2017	Brief of petitioner Charles Murphy filed.
Oct 06 2017	Brief amici curiae of American Civil Liberties, et al. filed.
Oct 06 2017	SET FOR ARGUMENT ON Wednesday, December 6, 2017
Oct 10 2017	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Oct 20 2017	CIRCULATED
Oct 30 2017	Brief of respondents Robert Smith, et al. filed. (Distributed)
Nov 06 2017	Brief amici curiae of States of Michigan, et al. filed. (Distributed)
Nov 16 2017	Reply of petitioner Charles Murphy filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 06 2017	Argued. For petitioner: Stuart Banner, Los Angeles, Cal. For respondents: Brett E. Legner, Deputy Solicitor General, Chicago, Ill.

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RECORD AND BRIEFS

16-1067

No. 16-

FILED
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SUPREME COURT, U.S.

In the Supreme Court of the United States

CHARLES MURPHY,

Petitioner,

v.

ROBERT SMITH AND GREGORY FULK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a prisoner obtains a monetary judgment in a suit under 42 U.S.C. § 1983 and the prisoner's lawyer is awarded attorney's fees, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). The defendant pays the remainder of the attorney's fees.

The question presented is whether the parenthetical phrase "not to exceed 25 percent" means *any amount up to 25 percent* (as four circuits hold), or whether it means *exactly 25 percent* (as the Seventh Circuit holds).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Murphy respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is published at 844 F.3d 653 (7th Cir. 2016). App 1a. The opinion of the District Court is unpublished. App. 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1997e(d)(2) provides in relevant part: "Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant."

STATEMENT

Under the Prison Litigation Reform Act, when a prisoner obtains a monetary judgment under 42 U.S.C. § 1983 and the prisoner's lawyer is awarded attorney's fees, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). Four circuits have adopted a literal interpretation of the parenthetical

phrase "not to exceed 25 percent." In these circuits, when the district court awards attorney's fees, the district court has the discretion to determine what portion of the judgment will be applied to the attorney's fees, so long as that portion does not exceed 25 percent of the judgment. The en banc Seventh Circuit, by contrast, has adopted a non-literal interpretation of the phrase "not to exceed 25 percent." In the Seventh Circuit, district courts must apply exactly 25 percent of the judgment toward the attorney's fees.

This Court should grant certiorari and reverse.

1. Petitioner Charles Murphy was a prisoner at the Vandalia Correctional Center in Illinois. App. 2a. Respondents Robert Smith and Gregory Fulk were officers of the prison. App. 2a. Respondents beat Murphy so badly that they crushed his eye socket. App. 3a. Murphy had surgery, but his vision remains doubled and blurred. App. 3a.

Murphy filed this section 1983 suit against Smith, Fulk, and two other officers. App. 3a. The jury found Smith liable for an unconstitutional use of force and a state law battery. App. 3a. The jury found Fulk liable for deliberate indifference to a serious medical need under the Eighth Amendment. App. 3a. The jury awarded $241,001 in damages against Smith and $168,750 in damages against Fulk. App. 3a. The District Court reduced the combined award to a total of $307,733.82. App. 3a.

The District Court awarded attorney's fees of $108,446.54. App. 28a. The District Court determined that under the Prison Litigation Reform Act,

42 U.S.C. § 1997e(d)(2), 10 percent of the judgment should be applied to the attorney's fees. App. 27a. The District Court accordingly ordered that Murphy pay $30,773.48 of the attorney's fees from the judgment, and that the balance of the attorney's fees be paid by the respondents. App. 28a.

2. The Seventh Circuit affirmed as to respondents' liability but reversed as to the apportionment of the attorney's fees.[1] The court noted that the District Court's allocation of 10 percent of the judgment toward attorney's fees "is consistent with decisions of other circuits, which allow such discretion." App. 13a (citing *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008), and *Parker v. Conway*, 581 F.3d 198, 205 (3d Cir. 2009)). But the court continued:

> We have read the statute differently. In *Johnson v. Daley*, 339 F.3d 582, 585 (7th Cir. 2003) (en banc), we explained that § 1997e(d)(2) required that "attorneys' compensation come[ ] first from the damages." "[O]nly if 25% of the award is inadequate to compensate counsel fully" does the defendant contribute more to the fees.

App. 13a. This interpretation, the court held, "is the most natural reading of the statutory text. We do not think the statute contemplated a discretionary decision by the district court. The statute neither uses

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[1] In a portion of the Seventh Circuit's opinion not relevant to this certiorari petition, the Seventh Circuit rejected respondents' argument that state-law sovereign immunity barred Murphy's state-law claims. App. 4a-12a.

discretionary language nor provides any guidance for such discretion." App. 13a.

The Seventh Circuit accordingly required Murphy to pay exactly 25 percent of the attorney's fees from the judgment—$76,933.46—rather than the $30,773.48 ordered by the District Court. App. 13a-14a.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit understated the magnitude of the circuit conflict. Four circuits, not two, read 42 U.S.C. § 1997e(d)(2) to give district courts discretion to apply any percentage of the judgment, not exceeding 25 percent, toward the attorney's fees. The Seventh Circuit is the only circuit that reads the statute to deny district courts this discretion, and to require that exactly 25 percent of the judgment be applied toward attorney's fees. Because the Seventh Circuit has adopted this view en banc, the conflict is unlikely to be resolved without this Court's intervention.

The Court should intervene now. This issue arises almost every time a prisoner is awarded damages in a section 1983 suit. The Seventh Circuit's interpretation directly contradicts the text of the statute. The Seventh Circuit's non-literal view denies district courts the discretion Congress intended them to have, and leaves prisoners whose constitutional rights have been violated with smaller net recoveries than Congress intended them to receive.

1. The circuits are split 4-1 over whether "not to exceed 25 percent," as the phrase appears in 42 U.S.C. § 1997e(d)(2), means "any amount up to 25 percent" or "exactly 25 percent."

Four circuits—the Second, Third, Sixth, and Eighth—read the statute literally. In these circuits, district courts have the discretion to apply any percentage of the judgment, "not to exceed 25 percent," toward the attorney's fees.

In *Shepherd v. Goord*, 662 F.3d 603, 607 (2d Cir. 2011), the Second Circuit held that the statute "requires the district court to apply some part of the monetary judgment awarded to plaintiff, 'not to exceed 25 percent,' against any fee award." The Second Circuit accordingly approved the District Court's decision to apply 10 percent of the judgment toward the attorney's fees. *Id.* at 610.

In *Parker v. Conway*, 581 F.3d 198, 205 (3d Cir. 2009), the Third Circuit likewise held that "[t]he PLRA's 25-percent provision does not require a district court to apply 25 percent of the judgment to satisfy an attorney's fee award when the attorney's fee award exceeds 25 percent of the judgment." The court explained that "a district court may apply less than 25 percent of the judgment (as long as it applies *some* portion of the judgment) to satisfy the attorney's fee award." *Id.* The Third Circuit thus approved the District Court's decision to apply approximately 18% of the judgment toward the attorney's fees. *Id.* at 201, 206.

In *King v. Zamiara*, 788 F.3d 207, 218 (6th Cir. 2015), the Sixth Circuit observed: "Neither the statute nor our cases provide guidance to assist the district courts in determining the appropriate percentage. However, some courts have determined that requiring plaintiffs to pay as little as $1 in attorney fees from the judgment is appropriate." The Sixth Circuit accordingly instructed the District Court "to exercise its discretion to apply some percentage of the judgment, not to exceed 25 percent, to attorney fees." *Id.*

Finally, in *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008), the Eighth Circuit held that "the phrase 'not to exceed 25 percent' clearly imposes a maximum, not a mandatory, percentage." The court observed that "the plain language of 42 U.S.C. § 1997e(d)(2) does not require the district court to automatically apply 25 percent of the judgment to pay attorney's fees. Instead the PLRA gives the district court discretion to apply a lower percentage." *Id.* The Eighth Circuit thus concluded that "the district court did not abuse its discretion by applying one percent ($250) of the $25,000 judgment to satisfy Boesing's attorney's fee award." *Id. See also Kahle v. Leonard*, 563 F.3d 736, 743 (8th Cir. 2009) ("A district court has discretion to apply between zero and 25 percent of the damages award towards attorneys' fees.").

By contrast, the Seventh Circuit requires district courts to apply 25 percent of the judgment toward the attorney's fees. "As we read subsection (2)," the en banc court explained, "attorneys' compensation comes *first* from the damages, as in ordinary tort lit-

igation, and only if 25% of the award is inadequate to compensate counsel fully may defendant be ordered to pay more under [42 U.S.C.] § 1988." *Johnson v. Daley*, 339 F.3d 582, 584-85 (7th Cir. 2003) (en banc).

In the opinion below, the Seventh Circuit relied on its en banc opinion in *Johnson*. Taking the view that "the most natural reading of the statutory text" imposes a mandatory 25 percent, the Seventh Circuit prohibited the District Court from exercising its discretion to apply 10 percent of the judgment toward attorneys' fees. App. 13a. The Seventh Circuit instead required the District Court to apply 25 percent. App. 13a-14a.

In its opinion below, the Seventh Circuit acknowledged that its view conflicts with that of other circuits. App. 13a. Respondents likewise acknowledged the conflict in their Seventh Circuit brief. Resp. C.A. Br. 25 ("Some federal courts of appeals have held that the 25% provision is a discretionary ceiling. That was error.") (citations omitted) (referring to *Parker* and *Boesing*). *See also Sutton v. City of Yonkers*, 2017 WL 105022, *8-9 (S.D.N.Y. 2017) (noting the conflict between the Seventh Circuit and the other circuits). This conflict is very unlikely to be resolved without this Court's intervention, because the Seventh Circuit has already decided the issue in an en banc opinion.

II. This issue arises almost every time a prisoner wins damages in a section 1983 suit.

District courts frequently confront the Question Presented, because it arises almost every time a prisoner wins damages under 42 U.S.C. § 1983. In recent years, prisoners have filed approximately 22,000 civil rights suits in federal court each year. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 157 (2015). Prisoners win approximately 10 percent of these suits—more than 2,000 cases per year. *Id.* at 164. There do not appear to be any published data on how many of these prevailing prisoners are awarded damages, but a sample of cases decided in 2012 indicates that a large majority of these cases involve damage awards. *Id.* at 168 (finding that 50 of 57 sampled cases involved damage awards). There also do not appear to be published data on the fraction of prevailing plaintiffs who are awarded attorney's fees, but that fraction is likely to be very high. Estimating extremely conservatively, if 2,000 prisoners win civil rights cases each year, 80 percent of them are awarded damages, and only half of the prevailing prisoners' attorneys are awarded attorney's fees, the Question Presented in this case recurs 800 times per year.

It is thus unsurprising that the district courts have had frequent occasion to write opinions addressing the issue. *See, e.g.*, *Sutton v. City of Yonkers*, 2017 WL 105022, *7-10 (S.D.N.Y. 2017); *Kensu v. Buskirk*, 2016 WL 6465890, *5 (E.D. Mich. 2016); *Perry v. Roy*, 2016 WL 1948823, *7 (D. Mass. 2016);

Wilson-El v. Mutayoba, 2015 WL 1944000, *2 (S.D. Ill. 2015); *Rodriguez v. Cty. of Los Angeles*, 96 F. Supp. 3d 1012, 1026 (C.D. Cal. 2014); *Berrian v. City of N.Y.*, 2014 WL 6604641, *4 (S.D.N.Y. 2014); *Gevas v. Harrington*, 2014 WL 4627616, *3 (S.D. Ill. 2014); *Hernandez v. Coord*, 2014 WL 4058662, *13 (S.D.N.Y. 2014); *Cleveland v. Curry*, 2014 WL 789098, *3 (N.D. Cal. 2014); *Harris v. Hobbs*, 2013 WL 6388626, *1-2 (N.D. Fla. 2013); *Kemp v. Webster*, 2013 WL 6068344, *5-6 (D. Colo. 2013); *Blake v. Maynard*, 2013 WL 3659421, *2 (D. Md. 2013); *Jellis v. Veath*, 2013 WL 1689061, *2 (S.D. Ill. 2013); *Tanner v. Borthwell*, 2013 WL 1148411, *1 (E.D. Mich. 2013); *Wilkins v. Gaddy*, 2012 WL 5872937, *6 (W.D.N.C. 2012); *Ford v. Bender*, 903 F. Supp. 2d 90, 101 (D. Mass. 2012), *rev'd on other grounds*, 768 F.3d 15 (1st Cir. 2014); *Prater v. Sahota*, 2012 WL 1641890, *3 (E.D. Cal. 2012); *Carter v. Wilkinson*, 2010 WL 5125499, *10 (W.D. La. 2010); *Thompson v. Torres*, 2010 WL 4919058, *2 (D. Mass. 2010); *Cornell v. Gubbles*, 2010 WL 3937597, *1-2 (C.D. Ill. 2010); *Shatner v. Cowan*, 2009 WL 5210528, *3-4 (S.D. Ill. 2009); *Collins v. Chandler*, 2009 WL 3459454, *2-3 (D. Del. 2009); *Barnard v. Piedmont Regional Jail Authority*, 2009 WL 3416228, *2 (E.D. Va. 2009); *Dykes v. Mitchell*, 2009 WL 3242006, *1-*2 (E.D. Mo. 2009); *Hall v. Terrell*, 648 F. Supp. 2d 1229, 1236-37 (D. Colo. 2009); *Miranda v. Utah*, 629 F. Supp. 2d 1256, 1257 (D. Utah 2009); *Murphy v. Gilman*, 2008 WL 2139611, *1-2 (W.D. Mich. 2008); *Norwood v. Vance*, 2008 WL 686901, *4 (E.D. Cal. 2008), *vacated on other grounds*, 591 F.3d 1062 (9th Cir. 2009); *Berberena v. Pesquino*, 2008 WL 68671,

*1 (S.D. Ill. 2008); *Baez v. Harris*, 2007 WL 4556911, *1 (N.D.N.Y. 2007); *Livingston v. Lee*, 2007 WL 4440933, *2 (N.D.N.Y. 2007); *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 822-23 (E.D. Mich. 2006); *Hightower v. Nassau Cty. Sheriff's Dep't*, 343 F. Supp. 2d 191, 193 (E.D.N.Y. 2004); *Farella v. Hockaday*, 304 F. Supp. 2d 1076, 1080-82 (C.D. Ill. 2004); *Jackson v. Austin*, 267 F. Supp. 2d 1059, 1071-72 (D. Kan. 2003); *Sutton v. Smith*, 2001 WL 743201, *2 (D. Md. 2001); *Morrison v. Davis*, 88 F. Supp. 2d 799, 811 (S.D. Ohio 2000); *McLindon v. Russell*, 108 F. Supp. 2d 842, 849 (S.D. Ohio 1999), *rev'd on other grounds*, 19 F. App'x 349 (6th Cir. 2001); *Searles v. Van Bebber*, 64 F. Supp. 2d 1033, 1042 (D. Kan. 1999), *vacated on other grounds*, 251 F.3d 869 (10th Cir. 2001); *Beckford v. Irvin*, 60 F. Supp. 2d 85, 89-90 (W.D.N.Y. 1999); *Roberson v. Brassell*, 29 F. Supp. 2d 346, 355 (S.D. Tex. 1998); *Collins v. Algarin*, 1998 WL 10234, *10 (E.D. Pa. 1998).

III. The Seventh Circuit's non-literal interpretation of the statute is incorrect.

The text of the statute provides that the portion of the judgment to be applied to attorney's fees is "not to exceed 25 percent." 42 U.S.C. § 1997e(d)(2). The Seventh Circuit is simply wrong in interpreting this language to mean "exactly 25 percent."

"Statutory interpretation, as we always say, begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Here, the text is so clear that interpretation should end with the text as well. "Not to exceed" does not mean "exactly." The text provides an upper limit of 25 percent, but it does not provide any

lower limit. It gives courts discretion to decide what percentage of the judgment should go toward attorney's fees, so long as that amount is no greater than 25 percent.

The Seventh Circuit reasoned that exactly 25 percent "is the most natural reading of the statutory text." App. 13a. But the Seventh Circuit's interpretation requires rearranging and rephrasing the statute. The only mandatory language in the statute is the word "shall." But "shall" modifies "be applied," not the percentage. The district court must apply *some* portion of the judgment toward the attorney's fees. But the statute leaves the percentage to the discretion of the court, so long as that percentage does not exceed the 25 percent ceiling. The Seventh Circuit reads the parenthetical phrase in the statute—"not to exceed 25 percent"—as if it said "which shall be 25 percent."

The Seventh Circuit's error becomes even clearer when one considers how its view would apply to uses of the phrase "not to exceed" in other contexts. For example, this Court often directs parties to file briefs "not to exceed" a certain number of words. *See, e.g.*, *Amgen Inc. v. Sandoz Inc.*, No. 15-1195, 2017 WL 358624 (Jan. 25, 2017) (ordering petitioner to file a brief "not to exceed 15,000 words"). On the Seventh Circuit's view, a brief of 14,999 words would violate this order, but to our knowledge the Court has never rejected a brief for being too short. Likewise, when a district court orders restitution in a criminal case, the court must "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5). On the Seventh Cir-

cuit's view, the district court could not set the date sooner than the 90th day. But this Court has sensibly interpreted "not to exceed 90 days" as a "90-day deadline," not a 90-day requirement. *Dolan v. United States*, 560 U.S. 605, 608 (2010).

Given the clarity of the statutory text, there is no occasion to examine the purpose of the statute, but if there were, that purpose would also expose the Seventh Circuit's error. The provision at issue was enacted as part of the Prison Litigation Reform Act. The purpose of the PLRA was to ensure "that the flood of nonmeritorious claims does not submerge and effectively preclude consideration of the allegations with merit." *Jones v. Bock*, 549 U.S. 199, 203 (2007). Congress gave district courts the discretion to "filter out the bad claims and facilitate consideration of the good." *Id.* at 204.

Section 1997e(d)(2) is a provision that applies only to the claims with merit. Before it becomes relevant, the jury has already determined that the defendants have violated the plaintiff's constitutional rights. Once section 1997e(d)(2) is at issue, the PLRA is meant to deter misconduct by prison guards, not to discourage prisoners from holding guards accountable. Congress's evident purpose was to allow district courts to apportion attorney's fees in a just manner, so long as the prevailing prisoner gets to keep at least 75 percent of the damages. Where the defendant's conduct is particularly egregious, the court has discretion to apportion less than 25 percent of the judgment to attorney's fees, *see, e.g.*, *Blake*, 2013 WL 3659421 at *2, but where the defendant's conduct is less egregious, the court has discretion to apportion

the full 25 percent, *see, e.g.*, *Harris*, 2013 WL 6388626 at *2. The Seventh Circuit erroneously withholds from the district courts the discretion that Congress intended them to have.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the decision below is so clearly wrong, the Court may wish to reverse summarily. In the alternative, the case should be set for argument.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
Seventh Circuit.

Charles Murphy, Plaintiff–Appellee,
v.
Robert Smith and Gregory Fulk, Defendants–Appellants.

No. 15-3384

Decided December 21, 2016

Appeal from the United States District Court for the Southern District of Illinois, No. 3:12-cv-00841-SCW Stephen C. Williams, Magistrate Judge.

Before Bauer, Manion, and Hamilton, Circuit Judges.

Hamilton, Circuit Judge.

Plaintiff Charles Murphy was an inmate in the Vandalia Correctional Center in Illinois. On July 25, 2011, correctional officers hit Murphy, fracturing part of his eye socket, and left him in a cell without medical attention. Murphy sued under 42 U.S.C. § 1983 and state-law theories. A jury awarded him damages on some of those claims, including some state-law claims, and the district court awarded attorney fees under 42 U.S.C. § 1988. Two of the defendants now appeal and challenge two aspects of the judgment. They argue that state-law sovereign immunity bars the state-law claims and that the Prison Litigation Reform Act requires that 25 percent of the damage award be used to pay the attorney fee award.

We affirm on the sovereign immunity defense. The Illinois doctrine of sovereign immunity does not

apply to state-law claims against a state official or employee who has violated statutory or constitutional law. See *Leetaru v. Board of Trustees of University of Illinois*, 392 Ill. Dec. 275, 32 N.E.3d 583 (Ill. 2015). Murphy alleged and ultimately proved such violations here. On the attorney fee issue, however, we reverse. Under 42 U.S.C. § 1997e(d), the attorney fee award must first be satisfied from up to 25 percent of the damage award, and the district court does not have discretion to reduce that maximum percentage. We remand for entry of a modified judgment.

I. Factual and Procedural Background

We recount the facts in the light reasonably most favorable to the verdict, which defendants do not challenge on the merits. On July 25, 2011, plaintiff Charles Murphy was a prisoner at the Vandalia Correctional Center. His assigned seat at mealtime that day had food and water on it. When he reported the mess, Correctional Officer Robert Smith first told him to clean it up himself and later told Murphy to leave the dining area. A different officer handcuffed Murphy, and Officer Smith escorted him to a segregation building. When they got there, a third officer asked Murphy what unit he normally stayed in, but Murphy ignored him. Officer Smith began moving his finger in and out of Murphy's ear, while asking Murphy if he was deaf and repeating the phrase "you can't hear, you can't hear." While this was happening, Lieutenant Gregory Fulk entered the building and saw what was happening.

Now escorted by three officers, Murphy was taken further into the segregation unit. Murphy did not struggle with the officers as they walked, although he taunted Officer Smith, promising what would

happen the next time he "ain't got no handcuffs on." Hearing that, Officer Smith hit Murphy in the eye and then applied a choke hold with his arm around Murphy's throat. Murphy lost consciousness. When he came to, Lieutenant Fulk and Officer Smith were pushing him into a cell. With his hands still cuffed behind his back, Murphy fell face-first into the cell and hit his head on its metal toilet. The officers took off his clothes and handcuffs and left without having checked his condition.

Thirty or forty minutes later, a nurse came to see Murphy, who was ultimately sent to a hospital. His orbital rim part of his eye socket—had been crushed and needed surgery. He had that surgery but did not recover completely. As of January 2015, his vision remained doubled and blurred.

In July 2012, Murphy filed suit in the Southern District of Illinois. After two rounds of complaint amendments and a partial grant of summary judgment for defendants, the case was tried to a jury. The jury found for plaintiff Murphy on four claims against two defendants—Lieutenant Fulk and Officer Smith, the appellants here. The jury found Officer Smith liable on two claims of state-law battery and one federal claim of unconstitutional use of force under the Eighth Amendment. The jury also found Lieutenant Fulk liable on a federal Eighth Amendment claim of deliberate indifference to a serious medical need. All told, the jury awarded $241,001 in compensatory and punitive damages against Officer Smith and $168,750 against Lieutenant Fulk. The district court reduced the combined award to a total of $307,733.82. That reduction is not at issue in this appeal. The district court also awarded attorney fees

and ordered that 10 percent of the damages awarded be put toward paying those fees. Officer Smith and Lieutenant Fulk have appealed.

II. Sovereign Immunity

The defendants argue first that state-law sovereign immunity bars Murphy's state-law claims. The district court found, and Murphy contends on appeal, that defendants waived their state-law sovereign immunity defense. We find no waiver but find that state-law sovereign immunity does not shield these defendants from liability.

A. Sovereign Immunity in Illinois

Illinois is protected against civil suits in federal court by two relevant doctrines. First, the "Eleventh Amendment immunizes unconsenting states from suit in federal court." *Benning v. Board of Regents of Regency Universities*, 928 F.2d 775, 777 (7th Cir. 1991); see also *Alden v. Maine*, 527 U.S. 706, 712–13, 119 S. Ct. 2240, 144 L.Ed.2d 636 (1999) (explaining broader concept of sovereign immunity for which "'Eleventh Amendment immunity ... is convenient shorthand'"). Second, an Illinois statute provides, with exceptions not relevant here, that "the State of Illinois shall not be made a defendant or party in any court." 745 Ill. Comp. Stat. 5/1. Under the *Erie Railroad* doctrine, that statute governs claims in federal court arising under state law. *Benning*, 928 F.2d at 777, citing *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). While both doctrines are often referred to as "sovereign immunity," they are not the same. See, e.g., *Beaulieu v. Vermont*, 807 F.3d 478, 485–86 (2d Cir. 2015) (distinguishing between Eleventh Amendment immuni-

ty and broader state sovereign immunity under Vermont law). As we explain below, important differences between the federal and state doctrines are decisive in this case.

B. Waiver

Before addressing the merits of the state-law sovereign immunity defense, we first address plaintiff Murphy's argument that defendants waived the defense. "[S]overeign immunity is a waivable affirmative defense." *Park v. Indiana University School of Dentistry*, 692 F.3d 828, 830 (7th Cir. 2012) (Eleventh Amendment), citing *Board of Regents of University of Wisconsin System v. Phoenix International Software, Inc.*, 653 F.3d 448, 463 (7th Cir. 2011); see also *Lapides v. Board of Regents of University System of Georgia*, 535 U.S. 613, 624, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002) (state's voluntary removal to federal court waived Eleventh Amendment immunity). If a state does not raise the immunity defense, "a court can ignore it." *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 389, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998). Because the defendants never relied and still do not rely on Eleventh Amendment immunity, they waived that defense. See *Park*, 692 F.3d at 830 (finding waiver where the state "never once raised the issue ... before the district court" and declined to raise the issue "even when prompted by this court at argument").[1]

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[1] Like the parties, we rely on Eleventh Amendment case law to address waiver. This is our usual approach under the *Erie* doctrine because procedural issues are governed by federal law in federal courts, and waiver is generally treated as procedural. See *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118, 1122–23 (7th Cir. 1998). Even if Illinois law governed the waiver is-

State-law sovereign immunity, however, is a defense the defendants raised at least five times: in their answer, in the final pre-trial conference, in the jury instruction conference, in the defendants' post-trial motion, and on appeal. Those references were explicitly to state-law sovereign immunity. The answer, for example, claimed protection under "statutory sovereign immunity," and in both the post-trial motion and the briefs before this court, the defendants relied on the Illinois State Lawsuit Immunity Act.

Plaintiff Murphy has not cited nor have we found any comparable case finding a waiver of a sovereign immunity defense. Cf. *Board of Regents*, 653 F.3d at 467 (finding waiver where state filed suit in federal district court); *Hill v. Blind Industries & Services of Maryland*, 179 F.3d 754, 756 (9th Cir. 1999) (finding waiver when defendant "participat[ed] in extensive pre-trial activities and wait[ed] until the first day of trial before objecting ... on Eleventh Amendment grounds"). Other circuits hold that equal or less robust efforts to raise the immunity defense do not waive it. See, e.g., *Union Pacific Railroad Co. v. Louisiana Public Service Comm'n*, 662 F.3d 336, 339–40 (5th Cir. 2011) (no waiver when defendant raised is-

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sue, there would be no waiver. Illinois appears to permit sovereign immunity waivers only by statute, not by litigation conduct. See *Township of Jubilee v. State*, 355 Ill. Dec. 668, 960 N.E.2d 550, 555 (Ill. 2011) ("[E]fforts by legal counsel for the State to defend itself ... will not result in a waiver or forfeiture of the State's statutory immunity. That is so because only the legislature itself can determine where and when claims against the state will be allowed."), citing *People ex rel. Manning v. Nickerson*, 184 Ill. 2d 245, 234 Ill. Dec. 375, 702 N.E.2d 1278, 1280 (1998).

sue for first time on appeal, after prevailing on a motion for summary judgment on the merits); *Ashker v. California Dep't of Corrections*, 112 F.3d 392, 394 (9th Cir. 1997) (no waiver when defendants raised issue "in their answer and pretrial statement ... and ... in their briefs filed in this court"). We reach the same conclusion here.

Plaintiff Murphy relies on the defendants' apparent willingness to defend this case on the merits. See *Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000) ("Courts have found waiver ... where the state ... evidenced an intent to defend the suit against it on the merits."). But in this case the significance of that willingness is at best equivocal. Both the defendants and the district court seemed at times to blend the state-law immunity question with the merits of plaintiff's claims. For example, the district court said that sovereign immunity did not shield the defendants because the jury, in ruling on the battery claim, necessarily determined that they acted outside their authority. *Murphy v. Smith*, No. 3:12–cv–00841 SCW, slip op. at 17–18 (S.D. Ill. Sept. 25, 2015).

That blending would be confusing under federal immunity law, whether under the Eleventh Amendment or doctrines of absolute immunity. As we explain below, though, the blending of state-law immunity and the merits under Illinois law accurately reflects state law. When a plaintiff sues a state official or employee, the Illinois case law links state-law immunity to the merits. If a plaintiff adequately alleges and ultimately proves that an Illinois official violated a statute or the Constitution, Illinois courts hold that the immunity statute does not apply to claims against the individual official. Because of that

linkage of immunity to the merits, the defense of the case on the merits is quite consistent with defendants' assertion of state-law sovereign immunity.

C. Illinois Sovereign Immunity for Individual Employees

The Illinois sovereign immunity statute protects the State against being "made a defendant or party in any court." 745 Ill. Comp. Stat. 5/1. Murphy argues that he has not sued the State of Illinois but only Illinois state employees. Whether the statute covers such state-law claims is a matter of state law. Our role is to decide questions of state law as we predict the state supreme court would decide them. E.g., *Rodas v. Seidlin*, 656 F.3d 610, 626 (7th Cir. 2011) ("When interpreting state law, a federal court's task is to determine how the state's highest court would rule."); *Barger v. State of Indiana*, 991 F.2d 394, 396 (7th Cir. 1993) ("State courts are the final arbiters of state law.").

Naming state employees as defendants would be too simple an evasion of the statute, which "cannot be evaded by making an action nominally one against the servants or agents of the State when the real claim is against the State of Illinois itself and when the State of Illinois is the party vitally interested." *Sass v. Kramer*, 72 Ill. 2d 485, 21 Ill. Dec. 528, 381 N.E.2d 975, 977 (1978). A substantial body of Illinois case law addresses when and under what circumstances the immunity statute applies to claims against state employees. See *Benning*, 928 F.2d at 779–80.

A claim against a state official or employee is a claim against the state when

> "there are (1) no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts; (2) the duty alleged to have been breached was not owed to the public generally independent of the fact of State employment; and (3) where the complained-of actions involve matters ordinarily within that employee's normal and official functions of the State."

Healy v. Vaupel, 133 Ill.2d 295, 140 Ill. Dec. 368, 549 N.E.2d 1240, 1247 (1990), quoting *Robb v. Sutton*, 147 Ill. App. 3d 710, 101 Ill. Dec. 85, 498 N.E.2d 267, 272 (1986). That analysis can be a difficult one, and the state cases guiding it have "not always been consistent." *Leetaru v. Board of Trustees of University of Illinois*, 392 Ill. Dec. 275, 32 N.E.3d 583, 602 (Ill. 2015) (Burke, J., dissenting). Compare *Healy*, 139 Ill. Dec. 780, 549 N.E.2d at 313 (applying immunity in part because the "relationship between the plaintiff and the defendants would not have had a source outside the employment status of the defendants"), with *Jinkins v. Lee*, 209 Ill. 2d 320, 282 Ill. Dec. 787, 807 N.E.2d 411, 420 (2004) (rejecting a "but-for" state employment immunity analysis).

This case is governed by an important exception to sovereign immunity in suits against state officials or employees. If the plaintiff alleges that state officials or employees violated "statutory or constitutional law," "|s|overeign immunity affords no protection." *Healy*, 140 Ill. Dec. 368, 549 N.E.2d at 1247. "This exception is premised on the principle that while legal official acts of state officers are regarded as acts of the State itself, illegal acts performed by the officers are not." *Leetaru*, 392 Ill. Dec. 275, 32

N.E.3d at 596. That exception distinguishes Illinois's sovereign immunity rule from federal law immunity doctrines, which usually apply to bar claims regardless of their potential merit. See, e.g., *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 92–93, 120–21, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (reversing on Eleventh Amendment immunity grounds a judgment on the merits for plaintiffs).[2]

Fritz v. Johnston, 209 Ill. 2d 302, 282 Ill. Dec. 837, 807 N.E.2d 461 (2004), shows the Illinois exception in operation and shows how state-law immunity depends on the merits of the plaintiff's claims. In that case, the plaintiff alleged that state employees conspired to force him to retire from his own state job by falsely telling the police that he had been making threats. Plaintiff alleged civil conspiracy and intentional interference with employment. The Illinois Supreme Court reversed dismissal of the case, holding that sovereign immunity did not apply because the plaintiff's factual allegations matched the crimi-

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[2] The Illinois exception for illegal acts by state officials resembles the federal rule under *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), but has much broader effects. *Ex parte Young* allows federal suits for injunctive and declaratory relief to require state officials to comply with federal law. The Illinois exception also allows suits for damages against state employees in their individual capacities. Compare *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 337 (7th Cir. 2000) ("the *Ex parte Young* doctrine allows private parties to sue individual state officials for prospective relief to enjoin ongoing violations of federal law"), with *Fritz v. Johnston*, 282 Ill. Dec. 837, 807 N.E.2d at 468 ("Whenever a state employee performs illegally [or] unconstitutionally ... a suit may still be maintained against the employee in his individual capacity[.]"), quoting *Wozniak v. Conry*, 288 Ill. App. 3d 129, 223 Ill. Dec. 482, 679 N.E.2d 1255, 1259 (1997).

nal offense of disorderly conduct. *Id.*, 282 Ill. Dec. 837, 807 N.E.2d at 467, citing 720 Ill. Comp. Stat. 5/26-1(a)(4) (West 1998).

This court's Illinois sovereign immunity cases have acknowledged this exception to sovereign immunity but most often have found that the exception did not apply. See, e.g., *Turpin v. Koropchak*, 567 F.3d 880, 884 (7th Cir. 2009) ("Nothing in Turpin's complaint alleges a violation of the State constitution or a statute, so this exception is off the table."). In particular, *Richman v. Sheahan*, 270 F.3d 430 (7th Cir. 2001), cabined the exception. We noted that the plaintiff had alleged a constitutional violation, but we found that sovereign immunity applied nonetheless because the plaintiff's state-law claims were "not dependent on the alleged constitutional violation." *Id.* at 442. *Richman*, however, preceded *Fritz*, which permitted state-law claims that did not depend on constitutional or statutory violations. *Fritz*, 282 Ill. Dec. 837, 807 N.E.2d at 467.

Richman also preceded *Leetaru*, which just last year reaffirmed the exception in broad terms, over a dissent that would have narrowed it to a scope closer to the federal *Ex parte Young* doctrine. *Leetaru*, 392 Ill. Dec. 275, 32 N.E.3d at 611–12 (Burke, J., dissenting). Despite the force of the dissent, our role under *Erie* is to take the *Leetaru* majority opinion at its word: the exception applies whenever "agents of the State have acted in violation of statutory or constitutional law." *Id.*, 392 Ill. Dec. 275, 32 N.E.3d at 597 (majority opinion).

In this case, Murphy alleged and then proved that the defendants' actions violated the United States Constitution. He also alleged and proved the factual

elements of the Illinois criminal offense of aggravated battery. That statute requires (1) "a battery, other than by the discharge of a firearm," and (2) that the defendant "knowingly ... [c]auses great bodily harm." 720 Ill. Comp. Stat. 5/12-3.05(a)(1) (West Supp. 2016) (effective July 1, 2011). Murphy alleged and proved to the jury that Officer Smith punched his face and head and choked him, then threw him into a cell with such force that he hit his face on a metal toilet. Officer Smith did so "without justification." Cf. 720 Ill. Comp. Stat. 5/12-3(a) (West 2002) (defining criminal battery as contact "without legal justification"). Murphy suffered "serious and permanent injury" and required reconstructive surgery. Since Murphy alleged and proved that Smith and Fulk acted "in violation of statutory or constitutional law," sovereign immunity does not bar his state-law claims. *Fritz*, 282 Ill. Dec. 837, 807 N.E.2d at 467, quoting *Healy*, 140 Ill.Dec. 368,549 N.E.2d at 1247.[3]

III. Attorney Fee

The Prison Litigation Reform Act sets limits on attorney fees awarded to prisoners who prevail in

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[3] We emphasize that Murphy both alleged *and proved* the violations in this case. Most Illinois cases dealing with this exception to sovereign immunity focus on the plaintiff's allegations because the appeals have arisen from motions to dismiss on the pleadings. We believe Illinois also requires a plaintiff ultimately to prove the alleged violations. For example, *Leetaru* explained that "sovereign immunity affords no protection when agents of the State *have acted* in violation of statutory or constitutional law or in excess of their authority," and in reversing dismissal on the pleadings, the court allowed defendants on remand to show their conduct was not "*in fact*" unauthorized, illegal, or in violation of plaintiff's rights. See 392 Ill. Dec. 275, 32 N.E.3d at 597 (emphasis added).

civil rights cases. 42 U.S.C. § 1997e(d). Whenever such a prisoner receives a monetary judgment, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." § 1997e(d)(2).

The district court interpreted that language to permit it to exercise its discretion in choosing the percentage of the damage award that should go toward the attorney fee, so long as the choice was no greater than 25 percent. The court allocated 10 percent of the damage award to satisfy the attorney fee award. That interpretation is consistent with decisions of other circuits, which allow such discretion. See *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008) ("plain language of 42 U.S.C. § 1997e(d)(2) does not require the district court to automatically apply 25 percent of the judgment to pay attorney's fees"); *Parker v. Conway*, 581 F.3d 198, 205 (3d Cir. 2009) (agreeing with *Boesing*).

We have read the statute differently. In *Johnson v. Daley*, 339 F.3d 582, 585 (7th Cir. 2003) (en banc), we explained that § 1997e(d)(2) required that "attorneys' compensation come[ ] first from the damages." "[O]nly if 25% of the award is inadequate to compensate counsel fully" does the defendant contribute more to the fees. *Id.* We continue to believe that is the most natural reading of the statutory text. We do not think the statute contemplated a discretionary decision by the district court. The statute neither uses discretionary language nor provides any guidance for such discretion.

Accordingly, we REMAND the case to the district court to modify its judgment to require Murphy to pay from the judgment the sum of $76,933.46 toward

satisfying the attorney fee the court awarded. In all other respects the judgment is

AFFIRMED.

Manion, Circuit Judge, concurring.

I join the court's opinion. I write separately to address the scope of Illinois' sovereign immunity defense for state employees sued in their individual capacities, which has been a difficult issue for the Illinois state courts. Because the plaintiff in this case prevailed on federal constitutional claims as well as state claims, only a small portion of the judgment is at stake in this appeal. Yet the case still presents an important issue of state law: to what extent Illinois' State Lawsuit Immunity Act and the Court of Claims Act confines intentional tort claims against state employees to the Illinois Court of Claims.

The State Lawsuit Immunity Act prohibits the State of Illinois from being named as a defendant in any court, with limited exceptions. 745 ILCS 5/1. One of those exceptions is the Court of Claims Act, which created that court as the "exclusive forum for resolving lawsuits against the state." *People ex rel. Manning v. Nickerson*, 184 Ill. 2d 245, 234 Ill. Dec. 375, 702 N.E.2d 1278, 1280 (1998) (internal quotation marks omitted). It provides in relevant part that the Court of Claims has exclusive jurisdiction over "[a]ll claims against the State for damages sounding in tort." 705 ILCS 505/8(d). In effect, the State's limited waiver of sovereign immunity gives it home-court advantage when it defends tort claims for damages. See *Loman v. Freeman*, 229 Ill. 2d 104, 321 Ill. Dec. 724, 890 N.E.2d 446, 458 (2008) (no right to a jury trial in the Court of Claims); *Reichert*

v. Court of Claims, 203 Ill. 2d 257, 271 Ill. Dec. 916, 786 N.E.2d 174, 177 (2003) (no right to appeal the merits of a Court of Claims decision).

The dispositive question here is whether state-law portions of this suit (the battery claims) against the defendant prison guards are really "against the State" for the purposes of these statutes. The most natural reading of the statute seems to preclude any court other than the Illinois Court of Claims from exercising jurisdiction over the plaintiff's intentional tort claim. Battery is a tort and the defendants here were acting in the scope of their state employment when they (according to the jury) battered the plaintiff. Had they not been doing so, the Illinois Attorney General's office would not have appeared on their behalf, as it did in the district court and in this court. 5 ILCS 350/2(a) & (e) (providing that the Illinois Attorney General will appear on behalf of a state employee sued for something "arising out of any act or omission occurring within the scope of the employee's State employment" and indemnify upon judgment against the employee in such cases). In every practical sense, this is a judgment that "could operate to control the actions of the State or subject it to liability." *Currie v. Lao*, 148 Ill. 2d 151, 592 N.E.2d 977, 980 (1992).

However, the Illinois Supreme Court has construed "against the State" more narrowly in suits against state employees. See, e.g., *Leetaru v. Bd. of Trs.*, 392 Ill. Dec. 275, 32 N.E.3d 583, 596 (Ill. 2015); *Loman*, 321 Ill.Dec. 724, 890 N.E.2d at 462.[1] That

[1] Several opinions of Illinois' intermediate appellate court read the Court of Claims Act more broadly; their reasoning would bring the plaintiff's battery claims within the exclusive juris-

court would hold that the defendants here acted outside their authority and therefore that immunity does not apply. We are bound to follow that court's holdings and reasoning. Therefore, I join the opinion of the court in full.

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diction of the Court of Claims. See, e.g., *Grainger v. Harrah's Casino*, 385 Ill. Dec. 265, 18 N.E.3d 265, 273–75 (Ill. App. Ct. 2014); *Sellers v. Rudert*, 395 Ill. App. 3d 1041, 335 Ill. Dec. 241, 918 N.E.2d 586, 591 92 (2009); *Welch v. Illinois Supreme Court*, 322 Ill. App. 3d 345, 256 Ill. Dec. 350, 751 N.E.2d 1187, 1194 (2001); *Campbell v. White*, 207 Ill. App. 3d 541, 152 Ill. Dec. 519, 566 N.E.2d 47, 53 (1991). However, we are bound only by the opinions of Illinois' highest court.

APPENDIX B

In the United States District Court
for the Southern District of Illinois

CHARLES MURPHY, Plaintiff,

vs.

ROBERT SMITH, et al., Defendants

Case No. 12-cv-0841-SCW

ORDER

WILLIAMS, Magistrate Judge:

Factual and Procedural Background

Plaintiff originally filed this suit on July 25, 2012, alleging six counts: 1) excessive force pursuant to 42 U.S.C. § 1983; 2) deliberate indifference to serious medical needs pursuant to 42 U.S.C. § 1983; 3) intentional infliction of emotional distress pursuant to Illinois state law; 4) battery pursuant to Illinois state law; 5) conspiracy pursuant to 42 U.S.C. § 1983; and 6) conspiracy pursuant to Illinois state law. (Doc. 2). On October 9, 2014, the Court denied in part and granted in part Defendants' motion for summary judgment, dismissing the § 1983 conspiracy claim and dismissing the state law conspiracy claim to the extent that they were based on an agreement to use excessive force or refuse to intervene. (Doc. 92). However, after further briefing from the parties, the Court permitted the state law conspiracy claims based on the alleged cover-up on the theory that the Defendants agreed to intentionally inflict emotional distress. (Doc. 92) (Doc. 114). Thus five claims proceeded to trial.

After the close of Plaintiff's case, Defendants moved for judgment as a matter of law on Plaintiff's claim for intentional infliction of emotional distress, which the Court granted. (Doc. 133). The Court dismissed Defendant Stewart at that time because that was the only claim against him. (Doc. 133). The jury verdict form divided the case into six counts: 1) use of unconstitutional force against Defendant Smith; 2) battery against Defendant Smith; 3) use of unconstitutional force against Defendants Fulk and Smith; 4) failure to intervene against Defendant Ritchey; 5) battery against Defendant Fulk and Smith; and 6) deliberate indifference to serious medical needs against Fulk, Smith and Richey. (Doc. 142.) The jury found in favor of Plaintiff and against Smith on Counts 1 and 2 in the amount of $40,000 for medical care, $7,500 for pain and suffering and $168,000 for punitive damages. (Doc. 140). It further found in favor of Defendants Fulk and Smith on Count 3, and in favor of Ritchey in Count 4. (Doc. 140). On Count 5, the jury found in favor of Defendant Fulk, but against Defendant Smith in the amount of $1.00 for medical care, $500.00 pain and suffering, and $168,000 for punitive damages. (Doc. 140).

Judgment was entered on February 2, 2015. (Doc. 143). All told, the jury awarded Plaintiff $409,750. (Doc. 143). Defendants filed a post-trial Motion, which the Court granted in part, reducing the award to Plaintiff to $307,733.82. (Doc. 175).

On February 14, 2015, Plaintiff filed a Motion for Attorney Fees Pursuant to 42 U.S.C. § 1988. (Doc. 149). Plaintiff's counsel also submitted an exhibit in support of his motion that alleged that he spent approximately 522.78 hours on this case and requested

a rate of $350.00 an hour, for a total of $182,973.00. (Doc. 150). On March 2, 2015, Defendants filed the aforementioned post-trial motion, to which Plaintiff drafted a response. (Doc. 156) (Doc. 159). Defendants filed an objection to Plaintiff's Motion for fees and costs on March 9, 2015. (Doc. 158). Plaintiff filed a Response to the Objection on March 23, 2015. (Doc. 161). On April 17, 2015, Plaintiff filed a Motion to Supplement his earlier fee petition and requested reimbursement for an additional 83 hours of labor spent responding to Defendants' motion and objections. (Doc. 165). Defendants filed an objection to this Motion to Supplement on May 1, 2015. (Doc. 166). Plaintiff filed a Response on May 3, 2015, (Doc. 167), but subsequently filed a "Corrected Version" on May 4, 2015. (Doc. 168). That objection states that Plaintiff spent an additional 6.5 hours preparing the response and requests a total of $214,298.00. (Doc. 168).

Analysis

Section 1988 provides: "In any action or proceeding to enforce a provision of section ... 1983 ... the court, in its discretion may allow the prevailing party ... a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. Generally, a party seeking attorney's fees is required to show 1) that it is a prevailing party and 2) that its request is reasonable. *Farrar v. Hobby*, 506 U.S. 103, 109-14 (1992). The appropriate fee under § 1988 is the market rate for the legal services reasonably devoted to the successful portion of the litigation. *Richardson v. City of Chicago*, 740 F.3d 1099, 1103 (7th Cir. 2014).

The basic means of calculating a reasonable attorney's fees under the *Hensley* or lodestar approach

is to multiply the number of hours reasonably expended by a reasonable attorney's rate. *Spellan v. Board of Educ. for Dist. 111*, 59 F.3d 642, 645 (7th Cir. 1995) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 430 n. 3 (1983)). The district court may then adjust the award after making such a calculation based on:

> the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal services properly; the preclusion of employment by the attorney due to acceptance of the case; the customary fee; whether the fee is fixed or contingent; time limitations imposed by the client or the circumstances; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the 'undesirability' of the case; the nature and length of the professional relationship with the client; and awards in similar cases.

Id.

The District Court has broad discretion in setting an appropriate attorney's fee, and may adjust the level of the award as it sees fit. *See Hensley*, 461 U.S. at 437.

1. Reasonable Rate

The first step then, is to determine a reasonable rate. Any award of attorney's fees should be tied to the going market rate for legal services. *Missouri v. Jenkins*, 491 U.S. 274, 283 (1989); *People Who Care v. Rockford Bd. of Educ., School Dist. No. 205*, 90 F.3d 1307, 1311 (7th Cir. 1996). The lodestar approach applies even in cases where counsel has proceeded after accepting a contingent fee arrangement.

Blanchard v. Bergeron, 489 U.S. 87, 94 (1989); *Pickett v. Sheridan Health Care Canter*, 664 F.3d 632 (7th Cir. 2011).

The Prison Litigation Reform Act provides a further limitation on the ability of a prisoner to recover attorney's fees. The fee must be "directly and reasonably incurred in proving an actual violation of Plaintiff's rights." 42 U.S.C. § 1997e(d)(1)(A). Further, the fee must be "proportionally related to the court ordered relief for the violation." 42 U.S.C. § 1997e(d)(1)(B)(i). The statute caps the hourly rate at 150 percent of the rate for court-appointed counsel under 18 U.S.C. § 3006A, and total amount cannot exceed 150 percent of the judgment. 42 U.S.C. § 1997e(d)(3). Finally, the statute requires that a portion of attorney's fees, not to exceed 25 percent, be paid directly out of the monetary judgment. 42 U.S.C. § 1997e(d)(2).

Here, plaintiff has requested a rate of $350 per hour. Defendants counter that pursuant to the PLRA, Plaintiff's counsel is limited to a rate of 150% of the rate chargeable by court-appointed counsel. Those rates were $125 from the period January 1, 2010 until August 31, 2013; $110 from September 1, 2013 until February 28, 2014; $126 from February 28, 2014 until December 31, 2014; and $127 from January 1, 2015 to the present. That would entitled Plaintiff's counsel to a rate of $187.50 for work performed between July 15, 2012 and August 31, 2013; $165 for work performed from September 1, 2013 until February 28, 2014; $189 for work performed from February 28, 2014 until January 1, 2015; and $190.50 for work performed from January 1, 2015 until present. Plaintiff did not contest this point or

these figures in his response to Defendants' objection, so the Court will use them as the correct figures.

2. Reasonable Hours Expended

Having determined the rates, the next step is to determine the appropriate number of hours worked. Defendants argue that they are entitled to a reduction in hours because Plaintiff did not succeed on all of his claims. As pointed out by Defendants, Plaintiff's federal conspiracy claim was dismissed out on summary judgment. Further, the Court granted judgment as a matter of law on Plaintiff's state law conspiracy claim, dismissing that claim at trial, and Defendant Stewart with it. Plaintiff prevailed on Counts 1 and 2 against Defendant Smith, but Fulk and Smith prevailed against Plaintiff on Count 3, as did Ritchey on Count 4. Plaintiff secured another victory against Smith on Count 5, but prevailed only against Fulk, and not Defendants Smith and Ritchey on Count 6.

Less than complete success on all claims is relevant to the Court's analysis of the reasonableness of the attorney's fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A plaintiff may only receive compensation for work performed on claims legally and factually related to the claim on which Plaintiff prevailed. *Id.* at 436. A court must consider whether the fee is reasonable in light of the results obtained, and may adjust an award up or down. *Sottoriva v. Claps*, 617 F.3d 971, 973 (7th Cir. 2010) (citing *Hensley*, 461 U.S. at 440). Downward adjustments that identify specific hours that should be eliminated may be reasonable when a Plaintiff prevails only on specific claims. *Id.* But, *Hensley* author-

ized a prevailing plaintiff to recover fees for time spent on claims where they shared a "common core of facts" or are "based on related legal theories." 461 U.S. at 435. The Seventh Circuit has applied this reasoning to pendant state claims in a federal action. *Zabkowicz v. West Bend Co. Civ. of Dart Industries, Inc.*, 789 F.2d 540, 551 (7th Cir. 1986). The proper inquiry is into the "interrelated nature of the lawsuit as a whole." *Id. See also Munson v. Milwaukee Bd. of School Directors*, 969 F.2d 266, 272 (7th Cir. 1992) ("Separating out the legal services rendered for the federal and pendent claims would be futile ..."). The Court must also consider whether the plaintiff's success makes the hours expended a satisfactory basis for making the fee award. *Hensley*, 461 U.S. at 434. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.* at 435.

Based on Plaintiff's success record, the Court finds that he is not able to recover for the time spent on his conspiracy claims because they do not share the same legal basis as Plaintiff's other claims and because Plaintiff did not ultimately succeed in showing that he had a legal basis to bring those claims. One of those claims was dismissed out on summary judgment and Plaintiff did not make his case at trial as to the other claim. Additionally, the Court found the pleadings so thin as to conspiracy claim as to require additional briefing prior to trial to determine the nature of the claim. The Court therefore cuts time it finds related exclusively to the conspiracy claim.

Plaintiff only brought conspiracy claims against Defendant Stewart; he was not implicated on the ex-

cessive force, battery, or deliberate indifference claims. Therefore, in calculating the lodestar amount, the Court excludes 2 hours from December 5, 2012 for "consider adding Russell Stewart as Defendant based on his report." The court also excludes 4 hours from December 8, 2012 for drafting and filing the amended complaint, which named Stewart. The Court further excludes entries from February and March 2013 related to Stewart's waiver of service, and time from April 2013 for reviewing Stewart's answer and motion to join the pending summary judgment motion. The Court will not consider time spent researching conspiracy affirmative defenses on April 10, 2013 either. The Court excludes time spent reviewing and responding to Defendants' motion for summary judgment between June 11, 2014 and July 14, 2014, and time spent in November and December of 2014 on preparing a trial brief on that issue.

The Court declines to reduce the lodestar amount of hours to account for Plaintiff's success on the state law battery claims. Defendants cite no authority for their argument that § 1988 precludes recovery on related state law claims. Here the Court finds that the battery claims were virtually indistinguishable from the unconstitutional use of force claims because they both addressed the same course of conduct and common core of facts. Plaintiff raised those counts against the same defendants, and witness testimony relevant to one count would be relevant to the other. Excessive force and battery are also similar legal theories that raise similar issues. The Court also finds that the state law battery claims are distinguishable from the conspiracy claims, which is an

entirely separate legal theory. For that reason, the Court declines to cut out preparation on the state claims out of the lodestar.

There are other billing entries that the Court declines to cut from the lodestar because it finds that they supported Plaintiff's overall case and cannot be separated from Plaintiff's success. Plaintiff's counsel did other work related to Stewart, but the Court finds this was time reasonably spent, as Stewart witnessed part of the events at issue and Plaintiff was obligated to investigate what Stewart knew as part of trial preparation. The same logic applies to Defendant Ritchey. Although the jury found in Ritchey's favor at trial, he was a key witness to the events at issue. The time Plaintiff's counsel spent investigating Ritchey's knowledge and presenting him as a witness was therefore reasonable. Likewise, the mixed results with regards to Defendants Smith and Fulk make it difficult for the Court to cull billing entries related to the unsuccessful claims because it is not clear, given the interrelated nature of the claims, what billing entries could be attributed to the successful claims against them as opposed to the unsuccessful. Plaintiff's success against those two Defendants, although partial, represents an extraordinary verdict in a prisoner case. The undersigned cannot recall any other prisoner case he has tried where a prisoner has secured a six figure verdict. For these reasons, the Court declines to eliminate other billing entries from the lodestar.

Defendants argue that several other billing entries should also be excluded from the lodestar calculation. Specifically, Defendants request that the Court cut time for a May 23, 2012 entry where

Plaintiff's counsel called Plaintiff's girlfriend to discuss Plaintiff's case. The Court agrees with Plaintiff that Defendants' characterization of this event is ambiguous, and finds that client contact is a reasonable billing entry. The Court also finds that time spent trying to facilitate client calls at the prison is reasonable time. The Court is aware that attorneys in other cases have been told that their phone lines cannot receive previously-scheduled collect calls from prisoners and that this difficulty is an ongoing and time-consuming issue in prisoner litigation generally. The Court finds these expenses reasonable as well. Defendants also complain that Plaintiff's counsel billed for research he did on conflict of interest and deciding whether to file a formal motion to remove the Attorney General's Office from the case. However, the billing entries document that Plaintiff had great difficulty in securing certain discovery from the Illinois Department of Corrections, that he received conflicting answers from the attorneys involved in those disputes, and that Defendants' counsel was not helpful in that regard. Plaintiff's attempts to explore avenues for getting his discovery when he perceived that Defendants' counsel had a conflict were reasonable. Finally, Defendants complain that Plaintiff billed for time to fix prior mistakes. The Court agrees with Defendants that this is not reasonable. *See Hensley v. Eckerhart*, 461 U.S. at 424 ("Hours that are not properly billed to one's *client* are not properly billed to one's *adversary* pursuant to statutory authority.") (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980)). Those hours will also be excluded.

3. PLRA § 1997e(d)(2)

Thus, after eliminating certain billing entries as discussed above, and using 150% of the CJA rates during the relevant time periods as the correct hourly rate, the Court has determined that the lodestar for this case would be $108,446.54. Defendants next request that pursuant to the PLRA, Plaintiff be required to pay 25% of his judgment towards the award of attorney's fees. Although defendants cite to *Johnson v. Daley* for this proposition, other cases interpreting that case have found that the language suggesting that the full 25% allowed by the PLRA must come first from the judgment is dicta. *See, e.g., Gevas v. Harrington*, No. 10-cv-493-SCW, 2014 WL 4627616 *3 (S.D. Ill. September 16, 2014) (awarding 10% of the judgment). The Court sees no reason to depart from its own prior practice of making a discretionary decision here. Defendants also make an argument based on the fact that Plaintiff has a fee agreement with his counsel. That is not relevant here. *See Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 640 (7th Cir. 2011) (finding reversible error where district court considered contingent fee agreement). Plaintiff shall pay 10% of the judgment or $30,773.48 towards the attorney's fees.

4. Costs

Defendants also contest some of Plaintiff's costs, in particular, his bills for a rental car and reimbursement for $1,311.00 for lodging, including the night of January 29, 2015, the day the verdict was reached. The Court finds it reasonable to stay overnight the night of the jury verdict, as the verdict came back after the close of business and Plaintiff's counsel had a long drive back to Chicago. However,

Plaintiff's hotel bill was $279 a night. The government per diem rate for the St. Louis area in January 2015 was $115 a night. The Court therefore finds Plaintiff's hotel rate excessive and reduces it to $115 per night for a total of $460. Defendants also challenge $418.45 for a rental car, but do not explain why that is not reasonable other than it is not listed under the statute. The Court finds that travel is the kind of expense frequently billed to clients and thus a reasonable inclusion in a fee petition. The Court reduces the costs submitted by Plaintiff to $2,197.12.

Conclusion

Plaintiff's Motion to Supplement is **GRANTED**. (Doc. 165). Plaintiff's Motion for Attorney's Fees is **GRANTED in part and DENIED in part**. (Doc. 149). Plaintiff's counsel is entitled to attorney's fees of $108,446.54 and litigation costs in the amount of $2,197.12. Plaintiff shall pay his attorney $30,773.48 towards the costs of the attorney's fees from the judgment. All other costs and fees shall be borne by Defendants.

IT IS SO ORDERED

Date: September 25, 2015

/s/ Stephen C. Williams
Stephen C. Williams
United States Magistrate Judge

APPENDIX C

In the United States District Court
for the Southern District of Illinois

CHARLES MURPHY, Plaintiff,

vs.

ROBERT SMITH, SHAWN RITCHEY, GREGORY FULK, RUSSELL STEWART, Defendant(s).

Case No. 12-841-SCW

JUDGMENT IN A CIVIL CASE

Defendant RUSSELL STEWART was dismissed with prejudice on January 28, 2015, by an Order entered Magistrate Judge Stephen C. Williams at the close of Plaintiff's case. (Doc. 132 and 133).

The claims against the remaining Defendants were submitted to the jury at the close of trial. The issues have been tried and the jury has rendered its verdict. (Doc. 142).

THEREFORE, judgment is entered in favor of Defendant RUSSELL STEWART and against Plaintiff. Judgment is entered in favor of Defendant SHAWN RITCHEY and against Plaintiff. Judgment is entered in favor of Plaintiff and against Defendant ROBERT SMITH in the amount of two hundred forty-one thousand and one dollars ($241,001.00). Judgment is entered in favor of Plaintiff and against Defendant GREG FULK in the amount of one hundred sixty-eight thousand seven hundred fifty dollars ($168,750.00).

DATED this 2nd day of February, 2015

Justine Flanagan, Acting Clerk

By: s/ / Angela Vehlewald

Deputy Clerk

Approved by s/ / Stephen C. Williams
United States Magistrate Judge
Stephen C. Williams

RECORD AND BRIEFS

FILED
JUL 12 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 16-1067

In the Supreme Court of the United States

CHARLES MURPHY,
PETITIONER,

v.

ROBERT SMITH AND GREGORY FULK,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Prison Litigation Reform Act (PLRA) provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2).

Did Congress intend that a prevailing prisoner's attorney be compensated first from the judgment, not to exceed 25 percent thereof, and that the defendant be liable for any balance of the fee award?

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OTHER AUTHORITIES

Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555 (2003).. 13

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INTRODUCTION

In ordinary tort litigation, attorney's fees are awarded first from the judgment itself. In civil rights actions, by contrast, prevailing plaintiffs are entitled to reasonable attorney's fees under 42 U.S.C. § 1988.

In the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e, Congress struck a balance between these two approaches by sparing prisoners who win damage awards from losing too great a portion of their awards to attorney's fees while at the same time deterring prisoners from filing marginal or trivial lawsuits by requiring them to "satisfy" any fee award up to 25% of the judgment. To this end, the PLRA provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." *Id.* § 1997e(d)(2). In this case, the Seventh Circuit held that a prevailing prisoner's attorney must be compensated first from the judgment, so long as that portion does not exceed 25% of the judgment, and that the defendant is liable for any balance of the fee award.

The petition should be denied for three reasons.

First, petitioner overstates the degree of conflict among the circuits. As the Court of Appeals recognized in this case, only two circuits (not four, as petitioner would have it) have squarely held that the PLRA gives district courts discretion to choose any portion of the judgment up to 25% to apply to a fee award. Moreover,

the conflict is not only shallow but thinly reasoned. The Seventh Circuit's terse discussion of the issue in the 2003 opinion relied upon by the court below was arguably dicta; the Eighth Circuit did not even mention the Seventh Circuit's construction when it reached a contrary result; and the Third Circuit summarily adopted the Eighth Circuit's conclusion. Given the absence of reasoning in those cases, there is every reason to believe that Third and Eighth Circuits will eventually review the issue en banc and agree with the Seventh Circuit. In any event, there is no pressing need for this Court to resolve the issue now.

Second, the issue arises far more rarely than petitioner asserts. As noted in the law review article on which petitioner himself relies, some 95% of prisoners in PLRA cases proceed pro se rather than being represented by private counsel, and very few prisoners litigate their claims to money judgments. When these factors are taken into account, it becomes clear that petitioner grossly overstates how often courts must grapple with the issue of satisfying attorney's fee awards out of prisoners' judgments. That, in turn, helps explain why only three circuits have had to address it in the more than 20 years since the PLRA's adoption.

Third, the Seventh Circuit correctly held that a prevailing prisoner under the PLRA must first compensate his attorney from the judgment but that, if 25% of the damages is inadequate to satisfy the fee award, the defendant is liable for the balance. This bright-line interpretation reflects the differences

between the PLRA's mandatory language and the discretionary wording of other fee-shifting statutes such as § 1988. And the Seventh Circuit's construction effectuates the PLRA's purposes by ensuring that prisoners bear some of their litigation costs even when they prevail but always keep at least 75% of the judgment, even if fees reach the PLRA's cap of 150% of the judgment—and even more if fees are less than 25% of the judgment. By contrast, petitioner's preferred rule creates no disincentive for marginal or trivial prisoner lawsuits and substitutes permissive language for Congress's mandatory wording. Worse, petitioner's construction would generate more litigation, in direct contradiction to the animating purpose of the PLRA.

STATEMENT

1. Petitioner, an inmate in Vandalia Correctional Center in Illinois, sued respondent correctional officers and two other Vandalia employees, alleging (among other things) that respondents violated the Eighth Amendment by using excessive force when escorting him to a segregation cell and by their deliberate indifference to his resultant serious medical needs. Pet. App. 1a-3a. He also alleged state-law battery claims against respondents. Pet. App. 3a.

A jury returned a verdict against petitioner except on his excessive force and battery claims against respondent Smith and his medical claim against respondent Fulk. Pet. App. 3a. The jury awarded him compensatory and punitive damages of approximately

$410,000.00, which was remitted to $307,733.82. Pet. App. 3a.

Petitioner sought attorney's fees of almost $214,000, for approximately 612 hours at an hourly rate of $350. Pet. App. 18a-19a. The district court calculated the reasonable fee award to be $108,446.54, applying the PLRA's hourly rate cap for prisoners' lawsuits (see 42 U.S.C. § 1997e(d) (incorporating 18 U.S.C. § 3006A(3)) and excluding certain hours as unreasonably expended. Pet. App. 21a–26a. The court then ordered petitioner to contribute 10% of the judgment toward the fee award, rejecting respondents' argument that under *Johnson v. Daley*, 339 F.3d 582, 585 (7th Cir. 2003), the court had to apply 25% of the judgment to satisfy the fee award and that respondents could be held liable only for the amount by which the fee award exceeded 25% of the judgment. Pet. App. 27a.

2. Respondents appealed, challenging (among other things) the percentage of the judgment that the district court applied to satisfy the fee award. Pet. App. 1a–2a. The Seventh Circuit reversed on the PLRA issue, holding that "the attorney fee award must first be satisfied from up to 25 percent of the damage award, and the district court does not have discretion to reduce that maximum percentage." Pet. App. 2a.

Quoting its en banc opinion in *Johnson*, the court reiterated that "the most natural reading" of the PLRA is that "'attorneys' compensation come[s] first from the damages'" and that "'[o]nly if 25% of the award is

inadequate to compensate counsel fully' does the defendant contribute more to the fees." Pet. App. 13a (quoting 339 F.3d at 585). Although noting that the Third and the Eighth Circuits construed the statute as discretionary, the court reasoned that the statute's text did not "contemplate[ ] a discretionary decision by the district court" because it "neither uses discretionary language nor provides any guidance for such discretion." *Ibid.* The court then remanded the matter to the district court to modify the judgment to apply 25% of the judgment to satisfy the fee award. Pet. App. 13a–14a.

3. Petitioner subsequently filed a petition in the Seventh Circuit for an additional $71,663 in attorney's fees on appeal. 7th Cir. Doc. 51. Respondents opposed the petition, arguing that petitioner failed to show that (a) the PLRA authorizes fee-shifting for time spent opposing their appeal from the judgment on his non-federal claims, which was the only merits issue on appeal, and from the order that he contribute only 10% of the judgment toward his attorney's fee; (b) the PLRA's hourly rate cap for attorneys in prisoner litigation, 42 U.S.C. § 1997e(d)(3), is inapplicable to his appellate fees; and (c) the fee sought was "reasonable," as a matter of both billing judgment and sufficiency of the evidence for the hourly rate claimed (if the PLRA rate cap were inapplicable) as well as the number of hours and types of tasks for which the attorney sought compensation. 7th Cir. Doc. 55. His fee petition remains pending as of the date this brief is being filed.

REASONS FOR DENYING THE PETITION

I. Petitioner Overstates the Circuit Split.

Petitioner asserts that the circuits are split four to one on the question presented, Pet. 1–2, 4–7, but he overstates both the magnitude of the split and the depth of the lower courts' reasoning.

Petitioner contends that the Second Circuit in *Shepherd v. Goord*, 662 F.3d 603 (2011), "approved the District Court's decision to apply 10 percent of the judgment toward the attorney's fees." Pet. 5 (citing 662 F.3d at 610). But the issue in *Shepherd* was whether the PLRA's cap on attorney's fees at 150% of the judgment applied to a nominal judgment of one dollar. After holding that it did (meaning that fees were capped at $1.50), the Second Circuit explicitly declined to address the question presented here—which would have come down to whether the prisoner paid his lawyer a dime or a quarter. 662 F.3d at 604 n.1. As one of the unpublished district court cases cited by petitioner observed, "[t]he Second Circuit has *not* decided any case that interprets this section of the PLRA, and thus has provided no guidance on its application," stressing that "[t]he application of § 1997e(d)(2) . . . was not raised on appeal" in *Shepherd*. *Sutton v. City of Yonkers*, No. 13-civ-801 2017 WL 105022, at *7 (S.D.N.Y. Jan. 11, 2017) (emphasis added), *report and recommendation adopted in part*, 2017 WL 1180918 (S.D.N.Y. Mar. 29, 2017).

Petitioner also implies that the Sixth Circuit construes § 1997e(d)(2)'s 25% requirement as merely discretionary, citing that court's instruction to the district court on remand in *King v. Zamiara*, 788 F.3d 207, 218 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 797 (2016), "'to exercise its discretion to apply some percentage of the judgment, not to exceed 25 percent, to attorney fees.'" Pet. 6. Yet the question was not squarely presented in *King*, for the district court had abused its discretion in denying punitive damages and then applying *none* of the judgment to satisfy the fee award. 788 F.3d at 218.

Prior Sixth Circuit cases do not clarify the picture. In *Walker v. Bain*, 257 F.3d 660 (6th Cir. 2001), which upheld the PLRA's fee cap against an equal protection challenge, the Sixth Circuit observed in dicta that § 1997e(d)(2) "*requires* 25 percent of the attorney fee award to be paid out of the plaintiff's recovery." *Id.* at 669 (emphasis added). Later, in *Riley v. Kurtz*, 361 F.3d 906, 911 (6th Cir. 2004), the Sixth Circuit observed, again in dicta, that under § 1997e(d)(2) "an attorney's compensation comes first from the damages (up to 25 percent), and then, if inadequate, the defendant is liable for attorney's fees under § 1988" for the balance. In short, the Sixth Circuit has yet to squarely address the question presented here, and its dicta on the issue point in both directions.

As neither the Second Circuit nor the Sixth Circuit has held that § 1997e(d)(2) confers discretion on district courts to apply less than 25% of the judgment to satisfy

a fee award, the Seventh Circuit was correct to conclude that the split currently stands at 2–1. Pet. App. 13a. What's more, the reasoning in these cases hardly represents the kind of percolation that ought to precede the grant of certiorari. The Seventh Circuit's discussion of the 25% issue in *Johnson* was itself arguably dicta, since that case, like *Walker*, involved an equal protection challenge to the PLRA's fee caps. For its part, the Eighth Circuit in *Boesing v. Spiess*, 540 F.3d 886 (8th Cir. 2008), ignored *Johnson*, choosing instead to follow what it called the "majority view" among district courts. *Id.* at 892 & n.5. And as for *Parker v. Conway*, 581 F.3d 198 (3d Cir. 2009), the Third Circuit in that case performed no legal analysis whatsoever; rather, it stated summarily that it "agree[d] with the *Boesing* court's holding" and "declined to follow" *Johnson*, *Riley*, and *Walker*. 581 F.3d at 204-05 & n.7.

Now that the Seventh Circuit has reiterated its construction of the statute in an opinion that cannot be deemed dicta, there is every reason to believe that both the Third and the Eighth Circuits will revisit the question en banc and agree with the Seventh Circuit. In any event, such a shallow and thinly reasoned circuit split does not warrant certiorari review, especially given that the issue arises so rarely (*see infra* Section II).

II. The Question Presented Arises Far More Rarely than Petitioner Asserts.

Petitioner insists that this Court's intervention is necessary because the question presented "arises almost every time a prisoner wins damages" under 42 U.S.C.

§ 1983, an event that he "extremely conservatively" estimates occurs about 800 times every year. Pet. 8–10. That is a gross overestimate.

Petitioner relies on a law review article for the assertion that prisoners win approximately 10% of the approximately 22,000 civil rights cases they file each year. Pet. 8 (citing Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 164 (2015)). Although he acknowledges the dearth of published data on point, petitioner infers from a sample of cases decided in 2012 that "a large majority of these cases involve damages awards." *Ibid.* (citing Schlanger, 5 U.C. Irvine L. Rev. at 168). And then, while frankly admitting that there is no published data on how many prevailing prisoners are awarded attorney's fees, petitioner speculates that the proportion is "likely to be very high," so he chooses 50 percent. *Ibid.*[1]

What petitioner fails to mention is that, according to the same law review article, prisoners in PLRA cases appear *pro se* about 95% of the time. *See* Schlanger, 5 U.C. Irvine L. Rev. at 167 (prisoners represented themselves in 95.6% of civil rights cases terminated in

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[1] The basis for this assumption is unclear. Pre-PLRA data indicated that prevailing prisoners received attorney's fees in "almost none" of their cases. Stewart J. Schwab and Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 772 (1988); *see also id.* at 730 n.42, 756, 770 n.191, 771–73.

2000, 96.5% of cases terminated in 2006, and 94.9% of cases terminated in 2012). Thus, counseled cases represent about 1,100 of the 22,000 civil rights cases filed yearly. The question presented can arise 800 times a year only if we assume prisoners obtain a money judgment and a fee award in almost three-quarters of those 1,100 counseled cases. Even granting that counseled cases probably constitute a disproportionately meritorious slice of the overall data set, that is a far-fetched assumption.

Closer study of the data in the cited law review article shows how far afield petitioner's estimates are. Using 22,000 cases per year as a baseline, as petitioner does (Pet. 8), we can deduct the 9.1% of prisoner civil rights cases that terminated without a judgment in 2012 (the most recent year studied), or 2,002 cases. Schlanger, 5 U.C. Irvine L. Rev. at 164. Of the remaining 19,998 cases, prisoners win just 0.5% (100) before trial; only 1.3% (260) proceed to trial, of which prisoners win 11.9% (31). *Ibid.* Thus, judging from the 2012 data, prisoners win something like 131 civil rights cases a year, counseled or not, a far cry from the figure of more than 2,000 that petitioner cites. *See* Pet. 8. Not all of those prevailing prisoners both obtain a money judgment *and* are represented by counsel, the two prerequisites for the question presented to arise. And even then, the parties will not raise the issue if, for instance, damages are nominal or the portion of the judgment applied to fees is for some other reason too small to be worth litigating.

Given the relative infrequency with which the question presented arises, it is unsurprising that only three federal courts of appeals have squarely addressed the question since Congress enacted the PLRA in 1996. It is also unsurprising that petitioner apparently could find only two district court cases per year addressing it, most of them unreported, over that 21-year period. Pet. at 8–10.[2] A question that arises so rarely does not merit this Court's attention.

III. The Seventh Circuit's Interpretation of the Statute Is Correct.

The Seventh Circuit's bright-line rule enforces the mandatory language of § 1997e(d)(2) and effectuates the PLRA's objective of discouraging prisoners from litigating marginal or trivial claims. By contrast, petitioner's standardless interpretation frustrates that objective by inviting additional litigation over the acceptable rationales for applying less than 25% of the judgment to satisfy a fee award, or over whether district courts abused their discretion by choosing a particular percentage.

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[2] Moreover, at least two of those district court cases did not address the issue. *See, e.g.*, *Carter v. Wilkinson*, No. 1:06-cv-02150, 2010 WL 5125499, at *10 (W.D. La. Dec. 9, 2010) (court "refrain[ed] for the present from rendering a decision on this point" because plaintiff had not provided sufficient information to award fees); *Sutton v. City of Yonkers*, No. 13-civ-801 2017 WL 105022 (S.D.N.Y. Jan. 11, 2017), *report and recommendation adopted in part*, 2017 WL 1180918, at *7 (S.D.N.Y. Mar. 29, 2017) (finding PLRA inapplicable).

Section 1997e(d)(2) mandates that "a portion of the judgment (not to exceed 25 percent) *shall be applied to satisfy*" the fee award. 42 U.S.C. § 1997e(d)(2) (emphasis added). Unlike the general civil rights fee-shifting statute, which provides that a district "court, *in its discretion, may allow* the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," 42 U.S.C. § 1988 (emphasis added), § 1997e(d)(2) contains no discretion-triggering (or discretion-guiding) language.

As § 1988 shows, Congress plainly knows how to insert such language into fee-shifting statutes. In the PLRA, it chose not to do so. Instead, it enacted a kind of automatic contingent fee mechanism whereby prisoner plaintiffs — like Social Security claimants, tort plaintiffs, real estate tax appellants, and many others — pay out 25% of their recovery as attorney's fees (so long as the fee award equals or exceeds 25% of the judgment) with the defendant picking up the balance up to 150% of the judgment. Prisoners are, of course, free to negotiate additional fee agreements with their counsel. *See* 42 U.S.C. § 1997e(d)(4); *cf. Gisbrecht v. Barnhart*, 535 U.S. 789 (2002) (holding that 42 U.S.C. § 406(b), which limits attorney's fees to 25% of past-due benefits, controls but does not displace attorney-client contingent fee agreements).

Petitioner focuses on the statutory phrase "not to exceed 25 percent," Pet. 10–12, but the Seventh Circuit's construction makes sense of that phrase. Section 1997e(d)(2) instructs district courts to look first

to the judgment to "satisfy" the fee award—but the portion applied may not exceed 25% of the judgment. When fees exceed one-fourth of the judgment, the 25% figure acts as a cap on the plaintiff's exposure. But in some cases—consider a plaintiff who recovers $100,000 in damages while incurring $15,000 in compensable fees—the entire fee award can be "satisf[ied]" by applying less than 25% of the judgment. Thus petitioner is wrong in his Question Presented to accuse the Seventh Circuit of reading "not to exceed 25 percent" to mean "*exactly 25 percent*." Pet. i (emphasis in original).

By requiring that prevailing prisoners apply 25% of the judgment to satisfy any fee award that equals or exceeds that amount, § 1997e(d)(2) promotes the PLRA's purpose of discouraging prisoners from filing marginal or trivial claims. Before the PLRA, prisoners "had little disincentive to file cases in [low expected damages or low chance of success or both] because their litigation costs were low or nonexistent." Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1608 (2003). Their filing fees were waived if they were indigent; prisons had to provide paper, writing materials, and postage; and a lawsuit often "might provide a useful relief from prison boredom." *Id.* at 1607-08; *see also Cleavinger v. Saxner*, 474 U.S. 193, 211 (1985) (Rehnquist, J., dissenting) (characterizing prisoners as "hav[ing] much to gain and virtually nothing to lose" from filing lawsuits). By enacting the PLRA, Congress sought to lighten the burden on the

federal judicial system caused by prisoners' claims and to protect the public fisc by shifting some litigation costs to prisoners to discourage them from filing frivolous or marginal lawsuits. *See, e.g.*, 141 Cong. Rec. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole) ("[W]e have witnessed an alarming explosion in the number of lawsuits filed by State and Federal prisoners. . . . Frivolous lawsuits filed by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population.").

The PLRA was a "sea change" that "rewrote both the law of procedure and the law of remedies" for prisoner litigation. Schlanger, 116 Harv. L. Rev. at 1627. Under the PLRA, prisoners must pay filing fees, either over time (if indigent) or up front (if they have "three strikes") (28 U.S.C. § 1915(b), (g)), as well as the defendant's costs if they lose (28 U.S.C. § 1915(f)), and they may not be awarded damages for mental or emotional injury absent physical injury (42 U.S.C. § 1997e(e)). *See* Schlanger, 116 Harv. L. Rev. at 1628–30.

Prisoners' attorney's fees and government defendants' litigation costs were of particular concern to Congress. *See, e.g.*, 141 Cong. Rec. S14317 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) ("[A]ttorney's fees must be proportionally related to the court ordered relief. No longer will attorneys be allowed to charge massive amounts to the State for the service of correcting minimal violations."); *Prison Reform:*

Enhancing the Effectiveness of Incarceration, Hearing before the Committee on the Judiciary United States Senate, July 28, 1995, at 3 ("The money saved by reducing litigation costs could more appropriately be used by the states to help ensure that adequate prison space is available . . . .") (Sen. Hatch); 141 Cong. Rec. H1480 (daily record Feb. 9, 1995) (the PLRA "places common sense limitations on the recovery of attorneys fees in prison litigation") (statement of Rep. Canady).

In view of this concern, the PLRA makes it more difficult for prisoners than for other prevailing civil rights plaintiffs to require government defendants to subsidize their litigation costs. *See Johnson*, 339 F.3d at 598 (explaining that PLRA "simply reduces the extent to which defendants must underwrite prisoners' suits"). Thus, attorney's fees "shall not be awarded" to prevailing prisoners unless they show such fees were (1) "directly and reasonably incurred" in proving a violation of the prisoner's federal rights, 42 U.S.C. § 1997e(d)(1)(A); (2) are either "proportionately related to the court ordered relief" or "directly and reasonably incurred in enforcing the relief," § 1997e(d)(1)(B); (3) are no more than 150 percent of the damages, § 1997e(d)(2); and (4) are calculated based on an hourly rate of no more than 150 percent of the hourly rate established under the statute authorizing the appointment of federal public defenders, § 1997e(d)(3). At the same time, § 1997e(d) does not limit the total amount the attorney may "*receive* . . ., not only because the attorney is entitled to 25% of the judgment under

subsection (2) but also because the client is free under subsection (4) to agree by contract to pay more" out of the judgment or other assets. *Johnson*, 339 F.3d at 584 (emphasis in original).[3]

By contrast, petitioner's construction of § 1997e(d)(2) ignores Congress's mandate that a portion of the judgment "shall be applied to satisfy" the judgment. It also conflicts with the PLRA's purpose: instead of decreasing prisoner lawsuits, it creates fodder for additional litigation. Because the statute provides no guidelines for exercising discretion, courts following petitioner's approach must step in to fill that gap. For example, the Eighth Circuit has transplanted into the PLRA its multi-factor test for determining whether a prevailing ERISA plaintiff should receive any fees, even though the PLRA's purpose, unlike ERISA's, is to limit how much governments must subsidize prisoner litigation. *Kahle v. Leonard*, 563 F.3d 736, 743 (8th Cir. 2009). District courts in some cases have looked to a variety of other criteria, such as the nature of the right at issue, the egregiousness of the defendant's conduct, and a punitive damages award's intent to punish the defendant. *See, e.g.*, *Sutton v. Smith*, No. CIV. A. AW-98-2111, 2001 WL 743201, at *2 (D. Md. June 26, 2001) (applying $1 from $9,000 judgment based on defendant's "egregious conduct"); *Morrison v. Davis*, 88

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[3] The district court here deemed petitioner's separate fee agreement with his attorney irrelevant. Pet. App. 27a.

F. Supp. 2d 799, 811 (S.D. Ohio 2000) (applying $1 from $15,000 judgment in light of "significant violation of the Plaintiff's rights," "the constitutional rights implicated, and the jury's clear signal that the Defendants should be punished"), *amended in part on other grounds*, 195 F. Supp. 2d 1019 (S.D. Ohio 2001). And at least one district court applied 25% of the compensatory damages but none of the punitive damages. *Livingston v. Lee*, No. 9:04-CV-00607-JKS, 2007 WL 4440933, at *2 (N.D.N.Y. Dec. 17, 2007). This multiplicity of approaches illustrates the error of petitioner's interpretation, for in enacting the PLRA Congress aimed to discourage prisoner litigation, not to create additional issues for litigation after prisoners prevail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CHARLES MURPHY,

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v.

ROBERT SMITH AND GREGORY FULK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents acknowledge, as did the Court of Appeals below, that the circuits are divided on the question presented. Respondents instead argue: (1) that the circuits are split 2-1, not 4-1; (2) that the question arises infrequently; and (3) that the decision below is correct. Respondents are mistaken in all three respects.

First, there are four circuits, not two, that have interpreted the statute literally, to give district courts the discretion to apply any percentage of the judgment, "not to exceed 25 percent," toward attorney's fees. While respondents are correct that some of the circuits have not discussed the issue at great length, that is because it is so simple that extended discussion would be silly.

Second, the issue arises frequently—indeed, it arises every time a counseled prisoner wins damages under 42 U.S.C. § 1983.

Third, the decision below is contrary to both the text and the purpose of the statute. The statute provides that the portion of the judgment to be applied to attorney's fees is "not to exceed 25 percent." 42 U.S.C. § 1997e(d)(2). Congress could not have been any clearer in authorizing district courts to choose the appropriate percentage, so long as the percentage is no greater than 25 percent. This provision comes into play only after the prisoner has already won his lawsuit, so interpreting it literally will not encourage frivolous suits, as respondents profess to fear. The only effect of a literal interpretation will be

to deter the sort of egregious misconduct by prison guards that took place in this case.

I. The circuits are split 4-1.

Respondents concede (BIO 8) that the Third and Eighth Circuits disagree with the Seventh. *See Parker v. Conway*, 581 F.3d 198, 205 (3d Cir. 2009) ("The PLRA's 25-percent provision does not require a district court to apply 25 percent of the judgment to satisfy an attorney's fee award"); *id.* at 205-6 n.7 (expressly rejecting the Seventh Circuit's view); *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008) ("the phrase 'not to exceed 25 percent' clearly imposes a maximum, not a mandatory, percentage").

But respondents err in claiming (BIO 6-7) that the Second and Sixth Circuits do not also disagree with the Seventh. In *Shepherd v. Goord*, 662 F.3d 603, 607 (2d Cir. 2011), the Second Circuit observed that the statute "requires the district court to apply some part of the monetary judgment awarded to plaintiff, 'not to exceed 25 percent,' against any fee award." The Second Circuit accordingly affirmed an award of 10 percent. *Id.* at 610. While the issue was not litigated in *Shepherd* because the amount at stake was so small, *id.* at 604 n.1, the district courts in the Second Circuit, one explicitly relying on *Shepherd*, now understand that they have the authority to apply less than 25 percent of a judgment to satisfy attorney's fees. *See Houston v. Cotter*, 2017 WL 587178, *5 n.7 (E.D.N.Y. 2017) (applying a nominal $1 from a $5,000 judgment); *Berrian v. City of New York*, 2014 WL 6604641, *4 (S.D.N.Y. 2014) (relying on *Shepherd* and applying a nominal $1 from a $65,000

judgment); *Hernandez v. Goord*, 2014 WL 4058662, *13 (S.D.N.Y. 2014) (applying approximately 5 percent of the judgment).[1]

The Sixth Circuit likewise disagrees with the Seventh. In *King v. Zamaria*, 788 F.3d 207, 218 (6th Cir. 2015), the Sixth Circuit observed that "some courts have determined that requiring plaintiffs to pay as little as $1 in attorney fees from the judgment is appropriate." The Sixth Circuit then instructed the district court "to exercise its discretion to apply some percentage of the judgment, not to exceed 25 percent, to attorney fees." *Id.* Contrary to respondents' view (BIO 7), the issue was squarely presented in *King*, because the parties were disputing the lawfulness of the district court's apportionment of fees. *Id.* The district courts in the Sixth Circuit, before and after *King*, have exercised their discretion to apply less than 25% of the judgment. *See Kensu v. Buskirk*, 2016 WL 6465890, *5 (E.D. Mich. 2016) (applying 1% of the judgment); *Murphy v. Gilman*, 2008 WL 2139611, *2 (W.D. Mich. 2008) (applying a nominal $1 from a judgment of $2.75 million).

Respondents suggest (BIO 8) that "the reasoning in these cases" does not go on long enough to be "the kind of percolation that ought to precede the grant of certiorari." But this issue is so simple that no

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[1] As respondents note (BIO 6), a Magistrate Judge within the Second Circuit has asserted that *Shepherd* offers no guidance, *Sutton v. City of Yonkers*, 2017 WL 105022, *7 & n.9 (S.D.N.Y. 2017), but this portion of the Magistrate Judge's opinion was not adopted by the District Court, which determined that the PLRA did not even apply to the case. *Sutton v. City of Yonkers*, 2017 WL 1180918, *3-4 (S.D.N.Y. 2017).

lengthy reasoning is required. The question is whether the phrase "a portion of the judgment (not to exceed 25 percent) shall be applied" authorizes district courts to apply a portion of the judgment that is less than 25 percent. Of course it does. Until they start paying judges by the word, it would be astonishing to find an opinion that devotes more than a few sentences to this question.

Respondents are on no firmer ground in speculating (BIO 8) that the circuits on the majority side of the split will now revisit the issue en banc in light of the decision below. It is very unlikely that any circuit will abandon a literal and sensible interpretation of the statute for the Seventh's Circuit's view, which is contrary to the statute's text and purpose. It is far more likely that the Seventh Circuit will continue to stand alone until this Court intervenes.

II. This issue arises whenever a counseled prisoner wins damages in a section 1983 suit.

Respondents erroneously suggest (BIO 8-11) that the question presented arises infrequently. In fact, it arises in every case in which a counseled prisoner wins damages in a section 1983 suit. No one seems to know exactly how often that is. Based on one set of assumptions, we presented one estimate in our certiorari petition; respondents, using a different set of assumptions, offer a smaller estimate.[2] But the

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[2] For what it's worth, respondents' lower figure appears to result primarily from a misinterpretation of Table 3 in Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 164 (2015). Using 2012 as

exact number does not matter much. Even on respondents' assumptions, the issue arises in more than 100 cases per year (BIO 10), which is plenty. The issue arises more frequently than most issues on which the Court grants certiorari.

Respondents further err in conflating (BIO 11) the frequency with which the issue arises with the number of district court opinions on Westlaw that address the issue. When prisoners win lawsuits, district courts almost certainly apportion attorney's fees without writing opinions in many cases. Even when district courts do write opinions, many never appear on Westlaw. No matter how one slices the available data, this issue arises every time a counseled prisoner wins damages in a section 1983 suit.

III. Respondents' view of the statute is contrary to its text and purpose.

The statute provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." 42 U.S.C. § 1997e(d)(2). Statutory text does not get any clearer than that. Some portion of the judgment must be applied to attorney's fees, and that portion cannot exceed 25 percent.

Respondents contend (BIO 12) that the statute "contains no discretion-triggering" language, but that is not so. By authorizing district courts to apply a portion of the judgment "not to exceed 25 percent,"

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an example, prisoners prevailed in 11.1% of judgments, which constituted 90.9% of terminations—an approximate 10% success rate in all suits. Respondents are counting only prisoner victories *at trial*, which is a much smaller number.

the statute plainly gives district courts the discretion to choose any percentage that does not exceed 25 percent. Respondents likewise err in suggesting (BIO 12-13) that the statute "instructs district courts to look first to the judgment to 'satisfy' the fee award." The statute says nothing of the kind. All it says is that some portion of the judgment, not to exceed 25 percent, should go toward the attorney's fees.

Most of respondents' merits argument (BIO 13-17) is understandably directed at the statute's purpose rather than its text. But respondents are mistaken here as well, for two reasons.

First, the purpose of the Prison Litigation Reform Act was not merely to deter frivolous suits. It was to "filter out the bad claims and facilitate consideration of the good." *Jones v. Bock*, 549 U.S. 199, 204 (2007). The particular provision at issue in our case applies only to meritorious suits. Before it can come into play, the prisoner must already have prevailed. Congress evidently intended to give District Courts some discretion to make defendants pay a greater share of the attorney's fees in egregious cases like ours, in which respondents administered such a savage beating that they crushed Charles Murphy's eye socket. To this day, six years after the beating, Murphy's vision remains doubled and blurred. A literal interpretation of the statute will not encourage frivolous suits, but perhaps it will deter similar misconduct by prison guards in the future.

Second, respondents profess to worry (BIO 16-17) that a literal interpretation of the statute will engender collateral litigation over the appropriate per-

centage of the judgment to be applied to attorney's fees. This worry is unfounded. District courts outside the Seventh Circuit have been exercising the discretion conferred by section 1997e(d)(2) for more than two decades now, without experiencing any burden. By the time the district court apportions the attorney's fees, the court has already presided over the case from start to finish, so the court knows everything it needs to know. No collateral litigation is required.

Of course, even if respondents' policy concerns were well founded, they could not override the plain text of the statute. The Seventh Circuit's non-literal interpretation denies district courts the discretion Congress intended them to have, and leaves prisoners whose constitutional rights have been violated with smaller net recoveries than Congress intended them to receive.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the decision below is so clearly wrong, the Court may wish to reverse summarily. In the alternative, the case should be set for argument.

Respectfully submitted,

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On Petition For A Writ Of Certiorari
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BRIEF OF *AMICI CURIAE* RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AND UPTOWN PEOPLE'S LAW CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Roderick and Solange MacArthur Justice Center ("RSMJC") is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at the Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

The Uptown People's Law Center is a not-for-profit legal clinic founded in 1975. In addition to providing legal representation, advocacy, and education for poor and working people in Chicago, the Uptown People's Law Center also provides legal assistance to people housed in Illinois prisons in cases related to their confinement. The Uptown People's Law Center has provided direct representation to over 100 prisoners, and currently has nine class action or putative class

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of amici curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission.

action cases pending relating to the civil rights of people confined in Illinois prisons.

SUMMARY OF ARGUMENT

This case affects the ability of men and women to recover a full measure of damages for injuries they suffer while incarcerated. Less obviously, however, the question presented also affects an attorney's compensation—and consequently, plaintiffs' access to counsel in civil rights cases challenging prison conditions. Slashing incentives for attorneys to take prisoners' rights cases—which the Court of Appeals did here by interpreting a statute to mean the opposite of what it says—ultimately curtails prisoners' access to counsel.

Retainer agreements in prisoners' rights cases often provide for an attorney who prevails for her client to recover a share of the damages award in addition to the statutory fees. Thus, the more a court reduces the damages award to cover statutory fees under 42 U.S.C. § 1997e(d)(2), the more the attorney's overall compensation declines, and the less attractive prisoners' rights cases become to attorneys in the future. For that reason, the Seventh Circuit's rule that a court must reduce the damages award by 25% to offset statutory fees in prison conditions cases has the ultimate effect of curtailing prisoners' access to counsel. This Court should grant certiorari not only because the Seventh Circuit's interpretation of the statute is incorrect for the reasons stated in the Petition, but also because the ruling below, if allowed

to stand, will diminish prisoners' ability to secure representation in future cases.

This Court has long recognized that access to counsel for indigent parties promotes the fair and orderly administration of justice. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). Prisoners, however, must go it alone an astounding 95% of the time in civil rights cases, a figure that dwarfs the usual rate in federal civil cases.

Not only are prisoners forced to litigate without counsel at an extremely high rate, but they face special obstacles that exacerbate the disadvantages of pro se representation. Prisoners are often illiterate, they cannot conduct a complete factual investigation and interview witnesses while locked up, and they frequently cannot afford litigation costs, such as court reporter and expert witness fees.

ARGUMENT

I. Among All Litigants, Prisoners Challenging the Conditions of Their Confinement Have the Worst Chances of Securing Representation.

Prisoners in civil rights cases represent themselves at a higher rate than any other category of litigant—nearly 95% of the time, as of 2012. Margo Schlanger, *Trends in Prisoner Litigation as the PLRA enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 167 (2015). That proportion exceeds the pro se rate for civil

cases litigated in federal court generally—which is 26%—by an enormous margin. *Id.*

Federal court appointment of counsel in prisoner civil rights cases is "quite rare, which makes sense given that courts can neither compel counsel to serve nor compensate them for their service." Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1612 (2003). That leaves most prisoner civil rights cases to the private bar, but the average prison conditions case is economically unattractive to attorneys attempting to secure an income through contingent fees. In 2012, for example, the average damages awarded for a prison conditions case successfully litigated to judgment was $20,815, and the total damages recovered in prison conditions cases brought by prisoners was just above $1,000,000 nationwide. Schlanger, *Trends in Prisoner Litigation*, at 166.

Nor can prisoners obtain representation through federally-funded Legal Services Corporations (LSCs) because of a 1996 law that forbids such organizations from representing prisoners. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(15), 110 Stat. 1321 (1996). In 1995, the year before that ban went into effect, LSCs had provided counsel in over 10,000 inmate matters. Schlanger, *Inmate Litigation*, 1632.

II. Justice Depends on the Very Thing Prisoners Almost Never Get: Access to Counsel.

Granting poor people access to counsel is "fundamental and essential to fair trials," *Gideon*, 372 U.S. at 344, in part because "[l]aymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of R.R. Trainmen*, 377 U.S. at 7. As Justice Breyer has observed, "[n]o one believes that a democracy's legal system can work effectively while reserving its benefits exclusively for those who are more affluent. We often debate who should provide those services, government or the private sector, but few deny that they should be provided." Stephen Breyer, Assoc. Justice, Supreme Court of the United States, Gauer Distinguished Lecture in Law and Public Policy: The Legal Profession & Public Service (Sept. 12, 2000).

Limited access to counsel undermines the fair administration of justice in American courts. Nearly a century ago, Chief Justice William Howard Taft declared, "[w]e must make it so that a poor man will have as nearly as possible an equal opportunity in litigating as the rich man." *See* American Federation of Labor, Report of Proceedings of the Forty-Second Annual Convention (June 12-24, 1922), at 387. But today, "[n]early one million low-income Americans are denied help from legal aid providers every year because of insufficient funding resources." Lauren Sudeall Lucas, *Deconstructing the Right to Counsel*,

Issue Brief, American Constitution Society (July 2014), at 1.

As Justice Ginsburg has noted, the United States lags behind other affluent democracies in funding for non-profit legal representation:

> Public funding for the legal representation of poor people in the United States is hardly generous . . . In civil cases, the combined legal services spending of U.S. local, state, and federal government agencies is, per capita, far below that of the governments of other democracies. In the 1990s, U.S. per capita government spending on civil legal services for poor people ranged around $2.25. New Zealand's government spent three times as much, per capita, funding legal aid in civil matters; the Netherlands, four times as much; and England, with a per capita outlay of $26, exceeded U.S. spending more than elevenfold.

Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the United States, Joseph L. Rauh Lecture at the University of the District of Columbia David A. Clarke School of Law: In Pursuit of Public Good: Lawyers Who Care (April 9, 2001).

Limited access to counsel can also undermine the orderly progression of litigation. "[E]very trial judge knows the task of determining the correct legal outcome is rendered almost impossible without

effective counsel." Robert Sweet, *Civil Gideon and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 505 (1998). Thus, access to counsel for poor people "result[s] in greater judicial efficiency by avoiding repeated appearances and delays caused by incomplete paperwork or unprepared litigants." *See* AM. BAR ASS'N, ABA TOOLKIT FOR A RIGHT TO COUNSEL IN CIVIL PROCEEDINGS 8 (2010).

III. Prisoners Face Even Greater Obstacles Than Other Laypeople When They Litigate Cases Without Counsel.

"[I]t is far more difficult for a prisoner to write a detailed complaint than for a free person to do so, and again this is not because the prisoner does not know the law but because he is not able to investigate before filing suit." *Billman v. Indiana Dept. of Corr.*, 56 F.3d 785, 790 (7th Cir. 1995) (Posner, J.). Thus, prisoners not only fare the worst in getting counsel—they also fare the worst when forced to proceed without counsel.

Literacy rates, which are lower among prisoners than non-prisoners, contribute to the difficulty of navigating the legal system without a lawyer. Andrea Amodeo et al., *Preparing for Life Beyond Prison Walls: The Literacy of Incarcerated Adults Near Release*, American Institutes for Research 7 (2010) ("Incarcerated adults had lower mean prose and quantitative literacy scores than adults in the household population.").

That said, "illiteracy is actually the least of an inmate plaintiff's problems." Schlanger, *Inmate Litigation*, 1611. Professor Schlanger elaborates:

> Inmates are unable to conduct most kinds of informal investigations; they cannot interview most witnesses, for example. And they cannot conduct effective discovery either, in part because of lack of legal skills and in part because prisons and judges are extremely nervous about sharing information with prisoners. Even in a very strong case, inmates have no cash and little access to credit, so they cannot fund litigation expenses (for example, deposition costs or expert fees) on the expectation of an eventual judgment or settlement.

Id. 1611-12.

Empirical evidence confirms that prisoners face major disadvantages when litigating cases pro se. A review of prisoner civil rights cases concluded in 2000 revealed that "counseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff's victory at trial." *Id.* at 1610.

* * *

Access to counsel in prisoners' rights cases is bleak. Prisoners need counsel, they need it badly, and most of the time they cannot get it because their cases are not worth a lot of money. The opinion below exacerbates the problem, and does so in defiance of the plain language of the relevant statute. The Court

should grant certiorari not only because the lower court's decision is wrong, but because it is wrong in a way that harms access to counsel and the equitable administration of justice.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

CHARLES MURPHY,

Petitioner,

v.

ROBERT SMITH AND GREGORY FULK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

When a prisoner obtains a monetary judgment in a suit under 42 U.S.C. § 1983 and the prisoner's lawyer is awarded attorney's fees, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). The defendant pays the remainder of the attorney's fees.

The question presented is whether the parenthetical phrase "not to exceed 25 percent" means *any amount up to 25 percent* (as four circuits hold), or whether it means *exactly 25 percent* (as the Seventh Circuit holds).

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BRIEF FOR PETITIONER

Petitioner Charles Murphy respectfully requests that this Court reverse the judgment of the U.S. Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is published at 844 F.3d 653 (7th Cir. 2016). Pet. App 1a. The opinion of the District Court is unpublished. Pet. App. 17a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 21, 2016. The petition for certiorari was filed on March 2, 2017. This Court granted certiorari on August 25, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1997e(d)(2) provides in relevant part: "Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant."

The complete text of 42 U.S.C. § 1997e is reproduced in the Appendix to this brief.

STATEMENT

When a plaintiff prevails under 42 U.S.C. § 1983, the district court has the discretion to order the defendant to pay the plaintiff's attorney's fees. 42 U.S.C. § 1988(b). Where the plaintiff is a prisoner

who wins a monetary judgment, the Prison Litigation Reform Act requires that some portion of the attorney's fees be paid by the plaintiff, out of the sum he recovers in the judgment. In such a case, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). The balance of the attorney's fees is paid by the defendant.

Four of the five courts of appeals that have considered the issue, along with the vast majority of district courts, interpret the statute literally, to give the district court discretion to choose the "portion" the plaintiff must pay from the judgment, so long as that portion does not exceed 25 percent. These courts have been exercising the discretion the statute gives them. Where the defendant's conduct is especially egregious, the district courts have been apportioning responsibility for paying a greater share of the attorney's fees to the defendant, and a correspondingly smaller share to the plaintiff.

The Seventh Circuit, by contrast, has adopted an idiosyncratic interpretation of the statute that strips district courts of discretion to apportion attorney's fees. The Seventh Circuit's interpretation adds an unwritten provision to the statute, under which the attorney's fees must always come out of the judgment first. Only if 25 percent of the judgment is inadequate to pay the attorney's fees does the defendant have any responsibility to contribute to the fees.

Prisoner cases typically yield small damage awards and are time-consuming to litigate, so attorney's fees are rarely less than 25 percent of the judgment. In 2012, for example, in cases classified by

the Administrative Office of the U.S. Courts as prison conditions/prisoner rights cases, the median damages award was only $4,185. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 168 (2015). In 1993, shortly before Congress enacted section 1997e(d)(2), the median damages award was only $1,000. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1602 (2003). Meanwhile, prisoner cases typically require plaintiff's counsel to invest considerable amounts of time. *Id.* at 1614-21, 1655-56. In our case, for example, plaintiff's counsel, a solo practitioner with limited resources, devoted hundreds of hours to the case. Pet. App. 18a.

Because 25 percent of the judgment is normally less than the amount of the attorney's fees, the Seventh Circuit's rule means that plaintiffs end up paying 25 percent of the judgment toward fees in virtually every case. The Seventh Circuit's interpretation of the statute denies district courts the discretion that Congress intended them to have—discretion they have been exercising for two decades—and leaves prisoners whose constitutional rights have been violated with smaller net recoveries than Congress intended them to receive.

1. Petitioner Charles Murphy was a prisoner at the Vandalia Correctional Center in Illinois. Pet. App. 2a. Respondents Robert Smith and Gregory Fulk were guards at the prison. Pet. App. 2a. One day at lunch, as Murphy reached his assigned seat in the prison cafeteria, he noticed food and water on his chair. Pet. App. 2a. He asked Smith to notify one of the inmates working in the cafeteria, whose job it

was to clean the chairs and tables. Pet. App. 2a; Tr. 670. Smith responded: "sit the F down ... clean it up yourself, use your hand." Tr. 670. Murphy replied: "I'm not going to use my hand when there's all type of Staph and bacteria stuff floating around and I got to turn around and use my hand to eat with." Tr. 670. Smith advised Murphy to "get the F out of my chow hall." Pet. App. 2a; Tr. 670.

As Murphy was leaving the cafeteria, another officer handcuffed him, with his hands behind his back. Pet. App. 2a; Tr. 671-72. Smith and Fulk escorted him to the prison's segregation unit. Pet. App. 2a; Tr. 673. As they did, Smith began shoving his finger into Murphy's ear, while saying "let me clean this nigger [sic] ears out. He can't hear. I'm cleaning his ears out." Pet. App. 2a; Tr. 718. When Murphy complained about the way he was being handled, Smith punched him in his right eye. Pet. App. 2a-3a. Smith and Fulk then applied so much pressure to Murphy's throat that he lost consciousness. Pet. App. 3a; Tr. 681. When Murphy awoke, Smith and Fulk were pushing him into a cell. Pet. App. 3a. Because his hands were still cuffed behind his back, Murphy fell face-first and hit his head on a metal toilet. Pet. App. 3a. Smith and Fulk removed Murphy's clothes and handcuffs and left him lying on the floor, naked, bleeding, in considerable pain, and in need of immediate medical attention. Pet. App. 3a; Tr. 683.

A nurse did not arrive until thirty to forty minutes later. Pet. App. 3a. Murphy was taken to the hospital, where it was found that his eye socket had been crushed. Pet. App. 3a. Murphy had eye surgery, but he has never fully recovered. His vision remains doubled and blurred. Pet. App. 3a.

Murphy filed this section 1983 suit against Smith, Fulk, and two other officers. Pet. App. 3a. The jury found Smith liable for an unconstitutional use of force and a state law battery. Pet. App. 3a. The jury found Fulk liable under the Eighth Amendment for deliberate indifference to a serious medical need. Pet. App. 3a. The jury awarded $241,001 in compensatory and punitive damages against Smith, and $168,750 in compensatory and punitive damages against Fulk. Pet. App. 3a. The district court reduced the combined award to a total of $307,733.82. Pet. App. 3a.

The district court awarded attorney's fees of $108,446.54. Pet. App. 28a. The court determined that under 42 U.S.C. § 1997e(d)(2), 10 percent of the judgment should be applied to the attorney's fees. Pet. App. 27a. As the court explained while approving the jury's award of punitive damages, in a separate order filed the same day as the order regarding attorney's fees, respondents' conduct was "reprehensible.... [B]rutality by those in a position of trust is a serious issue that justifies a substantial punitive damage award[ ]." 7th Cir. ER, 7:255 (doc. 175, p. 12). The district court accordingly ordered that Murphy pay $30,773.48 of the attorney's fees from the judgment, and that the balance of the attorney's fees be paid by the respondents. Pet. App. 28a.

2. The Seventh Circuit affirmed as to respondents' liability but reversed as to the apportionment of the attorney's fees. The court noted that the district court's allocation of 10 percent of the judgment toward attorney's fees "is consistent with decisions of other circuits, which allow such discretion." Pet.

App. 13a (citing *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008), and *Parker v. Conway*, 581 F.3d 198, 205 (3d Cir. 2009)). But the court continued:

> We have read the statute differently. In *Johnson v. Daley*, 339 F.3d 582, 585 (7th Cir. 2003) (en banc), we explained that § 1997e(d)(2) required that "attorneys' compensation come[ ] first from the damages." "[O]nly if 25% of the award is inadequate to compensate counsel fully" does the defendant contribute more to the fees.

Pet. App. 13a. This interpretation, the court held, "is the most natural reading of the statutory text. We do not think the statute contemplated a discretionary decision by the district court. The statute neither uses discretionary language nor provides any guidance for such discretion." Pet. App. 13a.

The Seventh Circuit accordingly required Murphy to pay 25 percent of the attorney's fees from the judgment—a sum of $76,933.46—rather than the $30,773.48 ordered by the district court. Pet. App. 13a-14a.

SUMMARY OF ARGUMENT

Under 42 U.S.C. § 1997e(d)(2), the district court has discretion to apply less than 25 percent of the judgment to attorney's fees.

A. The statute's text provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." The statute sets an upper limit of 25 percent, but no lower limit. The statute does not say that the plaintiff must pay all of the attorney's fees except to the ex-

tent they exceed 25 percent of the judgment. Nor does the statute say that "the judgment" must be applied to attorney's fees, up to the 25 percent cap. Rather, the statute confers discretion on the district court to choose the "portion" of the judgment that should be applied to satisfy the fee award.

The Seventh Circuit perceived support for its erroneous view in *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002). But the relevant passage in *Gisbrecht* involves a completely different question—what to do when an attorney is eligible for fees under two different statutes in the same case. This discussion in *Gisbrecht* has nothing to do with the interpretation of section 1997e(d)(2).

For more than twenty years, the vast majority of lower courts have interpreted the statute the way we do. During this period, Congress has considered amending the PLRA several times, but Congress has shown no interest in divesting the district courts of discretion to choose the appropriate percentage of the judgment to apply to attorney's fees.

B. The statute's context confirms that district courts have this discretion. When Congress provides for the award of attorney's fees, it normally authorizes district courts to exercise considerable discretion. The statutory scheme governing fees in prisoner cases is no exception. It preserves most of the district court's discretion over the amount of fees and how they should be apportioned. The wording of section 1997e(d)(2) is virtually identical to that of other statutes that plainly authorize district courts to exercise discretion over attorney's fees.

C. Discretion regarding the apportionment of attorney's fees best serves the purpose of the PLRA—to discourage frivolous prisoner suits and facilitate meritorious ones. Section 1997e(d)(2) is just one of several provisions in the PLRA that encourage attorneys to represent prisoners, and encourage prisoners to retain counsel, only in strong cases.

For two decades now, the district courts have been exercising their discretion under section 1997e(d)(2) to ensure that prisoners keep a greater share of their recovery, and that defendants pay more, in the more egregious cases, where there is the greatest reason to deter culpable conduct on the part of prison officials, and the greatest need for prisoners to retain counsel to help them seek relief. Where, as here, the defendant's conduct is especially shocking or culpable, district courts often apportion less than 25 percent of the judgment to attorney's fees. By contrast, where the defendant's conduct is less egregious, district courts often apportion the maximum 25 percent.

ARGUMENT

Under 42 U.S.C. § 1997e(d)(2), the district court has discretion to apply less than 25 percent of the judgment to attorney's fees.

Under 42 U.S.C. § 1997e(d)(2), the district court has discretion to apply less than 25 percent of the judgment to attorney's fees. The text of the statute confers this discretion. The statute's context confirms that district courts have this discretion. This literal reading of the statute best serves the purpose of the Prison Litigation Reform Act. Under any

method of statutory interpretation, the decision below is incorrect.

A. The text of the statute makes clear that the district court has discretion to apply any portion of the judgment up to 25 percent.

The text of the statute provides that the portion of the judgment to be applied to attorney's fees is "not to exceed 25 percent." 42 U.S.C. § 1997e(d)(2). The Seventh Circuit is wrong in interpreting this language to mean that the district court lacks discretion to apply less than 25 percent.

1. "Statutory interpretation, as we always say, begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). Here, the text is so clear that interpretation can end there as well. The statute provides an upper limit of 25 percent, but it does not provide any lower limit. It gives courts discretion to decide what "portion" of the judgment should be applied to the attorney's fees, so long as that amount is no greater than 25 percent.

The Seventh Circuit reasoned that the statute does not use "discretionary language." Pet. App. 13a. But the statute *does* use discretionary language—"not to exceed 25 percent." This language provides a range of possible percentages, and within that range it leaves the appropriate "portion of the judgment" to the discretion of the district court. The only mandatory language in the statute is "shall," but "shall" modifies "be applied," not the percentage. The district court must apply *some* percentage of the judgment toward the attorney's fees, but the court

retains the discretion to determine that percentage so long as it does not exceed the 25 percent ceiling.

It hardly needs saying that the phrase "not to exceed" means "lesser than or equal to." For example, this Court often directs parties to file briefs "not to exceed" a certain number of words. *See, e.g.*, *Amgen Inc. v. Sandoz Inc.*, 137 S. Ct. 908 (2017) (Mem.) (ordering petitioner to file a brief "not to exceed 15,000 words"). On the Seventh Circuit's view, a brief of 14,999 words would violate this order, but to our knowledge the Court has never rejected a brief for being too short. Likewise, when a district court orders restitution in a criminal case, the court must "set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing." 18 U.S.C. § 3664(d)(5). On the Seventh Circuit's view, the district court could not set the date sooner than the 90th day. But this Court has sensibly interpreted "not to exceed 90 days" as a "90-day deadline," not a 90-day requirement. *Dolan v. United States*, 560 U.S. 605, 608 (2010).

If Congress had intended to deny district courts any discretion in the matter, Congress could easily have said so. For example, the statute could simply have provided that the plaintiff must pay "all" of the attorney's fees, except to the extent they exceed 25 percent of the judgment. But the statute does not say that. Congress might have dispensed with the word "portion" and provided that the "judgment must be applied" to attorney's fees, except to the extent fees exceed 25 percent of the judgment. But the statute does not say that either. This might have been another sensible method of allocating the attorney's fees, but it is not the method Congress chose. *Cf.*

Jones v. Bock, 549 U.S. 199, 216-17 (2007) (observing that the PLRA's exhaustion requirement must be construed literally, not by substituting the court's judgment for that of Congress); *Coleman v. Tollefson*, 135 S. Ct. 1759, 1763-64 (2015) (giving the PLRA's three-strikes provision a "literal reading"). The courts may not "rewrite the statute that Congress has enacted." *Puerto Rico v. California Tax-Free Trust*, 136 S. Ct. 1938, 1949 (2016) (citation and internal quotation marks omitted).

In their Brief in Opposition (BIO 13), respondents attempted to rescue the Seventh Circuit's interpretation of the statute by placing great weight on the word "satisfy." Respondents suggest that because a portion of the judgment must be applied to "satisfy the amount of attorney's fees," a defendant need not pay any portion of the attorney's fees until the plaintiff has reached the 25 percent cap.

No court to our knowledge has ever accepted this argument, for good reason. The statute explicitly designates the amount that must be applied to satisfy the amount of attorney's fees—"a portion of the judgment (not to exceed 25 percent)." The statute directs the court to choose the appropriate portion of the judgment, up to 25 percent, and then to use that portion to reduce the defendant's obligation to pay attorney's fees. The statute does not say that the *judgment* shall be applied to satisfy the attorney's fees, up to a maximum of 25 percent. It specifies that any "*portion* of the judgment," up to 25 percent, shall be applied to satisfy the attorney's fees. The statute leaves the size of that portion to the district court's discretion.

Because the text of the statute is clear, every other court of appeals to address the issue has had little trouble concluding that district courts have the discretion to choose a percentage less than 25 percent. *See Shepherd v. Goord*, 662 F.3d 603, 610 (2d Cir. 2011); *Parker v. Conway*, 581 F.3d 198, 204-05 (3d Cir. 2009); *King v. Zamiara*, 788 F.3d 207, 218 (6th Cir. 2015); *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008). The vast majority of district courts have reached the same conclusion. *Kemp v. Webster*, 2013 WL 6068344, *5 & n.5 (D. Colo. 2013) (collecting cases). "The plain language of the 25-percent provision is unambiguous," the Third Circuit has noted. "The statute does not compel district courts to apply 25 percent of the judgment to pay attorney's fees when the attorney's fee award exceeds that amount." *Parker*, 581 F.3d at 204-05. As the Eighth Circuit has observed, "the phrase 'not to exceed 25 percent' clearly imposes a maximum, not a mandatory, percentage. This statute is not ambiguous." *Boesing*, 540 F.3d at 892.

2. The decision below was the Seventh Circuit's second case addressing this issue. Its first, *Johnson v. Daley*, 339 F.3d 582 (7th Cir. 2003) (en banc), reached the same result via a different theory, but the reasoning of *Johnson* is no more supportable than the reasoning of the decision below.

In *Johnson*, the Seventh Circuit concluded:

> As we read subsection (2), attorneys' compensation comes *first* from the damages, as in ordinary tort litigation, and only if 25% of the award is inadequate to compensate counsel fully may defendant be ordered to pay more

> under § 1988. Cf. *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002) (using this approach in Social Security cases, where any excess would be provided by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), rather than § 1988).

Johnson, 339 F.3d at 584-85 (parallel citation omitted). This was *Johnson*'s complete treatment of the issue, an issue that was not litigated by the parties or addressed by any of the en banc court's concurring or dissenting opinions.

Johnson's analogy to *Gisbrecht* is a very poor one. In the passage from *Gisbrecht* to which the Seventh Circuit evidently referred, the Court was addressing a completely different question—what to do when plaintiff's counsel is eligible for attorney's fees under two federal statutes in the same case. The Court explained that counsel is not entitled to a double award of fees, so any award under one statute must be offset by an equivalent reduction of the award under the other statute. *Gisbrecht*, 535 U.S. at 796. In *Gisbrecht*, one of the two statutes was 42 U.S.C. § 406(b), which authorizes a court to award plaintiff's counsel attorney's fees in Social Security cases, to be paid out of the judgment recovered by the plaintiff. Under section 406(b), the attorney's fees may not exceed 25 percent of the past-due benefits the plaintiff was awarded in the judgment. The Court observed that if plaintiff's counsel receives attorney's fees out of the judgment under section 406(b), and also receives attorney's fees under the Equal Access to Justice Act, counsel must refund the appropriate amount to the plaintiff, so counsel is not being compensated twice. *Id.*

This discussion in *Gisbrecht* has nothing at all to do with the issue in our case and in *Johnson v. Daley*, other than the fact that they both involve attorney's fees and the phrase "25 percent." *Gisbrecht* might have some relevance if a prisoner's counsel were entitled to attorney's fees under two different federal statutes, but that is an uncommon situation that was not present in *Johnson* and is not present in our case. In *Gisbrecht* the Court simply did not speak to our issue.

Moreover, the text of the statute directly contradicts the Seventh Circuit's assertion in *Johnson* that "only if 25% of the award is inadequate to compensate counsel fully may defendant be ordered to pay more." *Johnson*, 339 F.3d at 585. The statute says nothing of the kind. It says that the portion of the judgment is "not to exceed 25 percent," not that it must equal 25 percent.

Johnson v. Daley is so unpersuasive that for many years the district courts within the Seventh Circuit disregarded its comments on section 1997e(d)(2) as ill-considered dicta. *See, e.g.*, *Gevas v. Harrington*, 2014 WL 4627616, *3 (S.D. Ill. 2014); *Cornell v. Gubbles*, 2010 WL 3937597, *2 (C.D. Ill. 2010); *Farella v. Hockaday*, 304 F. Supp. 2d 1076, 1080-81 (C.D. Ill. 2004). The district court in our case did the same. Pet. App. 27a. In fact, in *Johnson v. Daley* itself, on remand, the district court disregarded the Seventh Circuit's discussion of the issue and applied only 5% of the judgment toward the attorney's fees. *Johnson v. Daley*, 2003 WL 23274532, *1 (W.D. Wisc. 2003). The Seventh Circuit's first try at interpreting the statute was thus just as implausible as the decision below.

3. For more than twenty years now, the district courts—even in the Seventh Circuit, until this case—have been exercising the discretion the statute plainly confers. On several occasions during this period, Congress has considered bills and held hearings to amend various aspects of the Prison Litigation Reform Act. *See* H.R. 3718, 105th Cong. (1998); S. 2163, 105th Cong. (1998), §§ 15-17; H.R. 12, 106th Cong. (1999); S. 248, 106th Cong. (1999), §§ 15-17; H.R. 4109, 110th Cong. (2007); H.R. 4335, 111th Cong. (2009); *Private Prison Information Act of 2007, and Review of the Prison Litigation Reform Act: A Decade of Reform or An Increase in Prison and Abuses?: Hearing on H.R. 1889 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2007); *Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. (2008). Yet in all this time, Congress has given no indication of any interest in eliminating the district courts' widely-recognized discretion to choose the portion of the judgment to apply toward attorney's fees.

Where the lower courts have virtually unanimously interpreted a statute in a particular way over an extended period of time, especially where Congress has had ample opportunity to intervene, "we have recognized that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that Congress at least acquiesces in, and apparently affirms, that interpretation." *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (citation, brackets,

and internal quotation marks omitted). *See also Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731-33 (1975); *Gulf Oil Corp. v. Copp Paving Co., Inc.*, 419 U.S. 186, 200-01 (1974). On respondents' view of the statute, the vast majority of courts have been flouting the will of Congress for two decades, without a peep from Congress. On our view, the courts have been getting it right.

B. The statute's context confirms that district courts have this discretion.

Given the clarity of the statute's text, there is no occasion for the Court to go further. But if there were, the context surrounding section 1997e(d)(2) would confirm that district courts have the discretion to apply less than 25 percent of the judgment to attorney's fees.

Congress's fee-shifting statutes typically "confer[ ] broad discretion on district courts." *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1988 (2016). As the Court has explained, "litigation is messy, and courts must deal with this untidiness in awarding fees." *Fox v. Vice*, 563 U.S. 826, 834 (2011). For this reason, when Congress provides for the award of attorney's fees, Congress virtually always authorizes district courts to exercise considerable discretion. *See Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013) (providing several examples of highly discretionary fee-shifting statutes); *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 254 (2010) ("Statutes vesting judges with such broad dis-

cretion are well known in the law, particularly in the attorney's fees context.").

The statutory scheme governing the award of attorney's fees in prisoner cases is no exception. To begin with, the court's authority to award fees comes from 42 U.S.C. § 1988(b), which simply states: "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." If the court does award attorney's fees, the only constraint in section 1988 is that they must be "reasonable." As the Court has emphasized, under section 1988 "the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

The PLRA was enacted against this backdrop. Pub. L. No. 104-134, tit. 8, §§ 801-810, 110 Stat. 1321, 1321-66 to 1321-77 (1996). The PLRA imposed some restrictions on fee awards in prisoner cases, but these restrictions are likewise expressed in highly discretionary terms. Attorney's fees must be "directly and reasonably incurred in proving an actual violation of the plaintiff's rights." 42 U.S.C. § 1997e(d)(1)(A). The amount of the fee must be "proportionately related to the court ordered relief," *id.* § 1997e(d)(1)(B)(i), or "directly and reasonably incurred in enforcing the relief," *id.* § 1997e(d)(1)(B)(ii). Fees must be "not greater than 150 percent of the judgment," *id.* § 1997e(d)(2), and the hourly rate used to calculate the fee may not exceed 150 percent of the rate for appointed criminal

defense counsel, *id.* 1997e(d)(3). Finally, of course, the plaintiff must pay "a portion of the judgment (not to exceed 25 percent)" toward the fee. *Id.* § 1997e(d)(2).

All this discretionary language indicates that in enacting the PLRA, Congress did not divest the district courts of most of their traditional discretion regarding attorney's fees. Whether to award attorney's fees in the first place remains committed to the district court's discretion. So does the amount of the fee, subject to the two 150 percent caps. In this context, it is hardly remarkable that Congress would likewise authorize district courts to exercise discretion regarding the apportionment of the fee.[1]

Indeed, the wording of section 1997e(d)(2) is identical or nearly identical to that of other statutes that plainly authorize district courts to exercise discretion over attorney's fees. For example, in suits involving the life insurance policies available to veterans, the court "shall determine and allow reasonable ... fees *not to exceed* 10 per centum of the amount recovered." 38 U.S.C. § 1984(g) (emphasis added). In suits to recover Social Security benefits, the district court may allow "a reasonable fee ... *not in excess* of 25 percent of the total of past-due benefits." 42 U.S.C. § 406(b)(1)(A) (emphasis added). Section 1997e(d)(2), which provides that district courts may

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[1] Other provisions of the PLRA sharply restricted district courts' discretion to impose injunctive relief. In this respect, "curbing the equitable discretion of district courts was one of the PLRA's principal objectives." *Miller v. French*, 530 U.S. 327, 339 (2000). Congress did not enact comparable curbs on the discretion of district courts regarding attorney's fees.

choose a portion of the judgment "not to exceed 25 percent," confers similar discretion.

C. Discretion regarding the apportionment of attorney's fees best serves the purpose of the PLRA.

Because the statute's text is so clear, there is no occasion to consider the purpose of the statute. *Boyle v. United States*, 556 U.S. 938, 950 (2009). But if there were, it would be apparent that this discretion directly advances the purpose of the Prison Litigation Reform Act—to discourage frivolous prisoner suits without discouraging meritorious ones. "What this country needs, Congress decided, is fewer and better prisoner suits." *Jones v. Bock*, 549 U.S. 199, 203 (2007). "To that end, Congress enacted a variety of reforms designed to filter out the bad claims and facilitate consideration of the good." *Id.* at 204.

This purpose is evident throughout the PLRA's legislative history. *See, e.g.*, 141 Cong. Rec. 35,797 (1995) (Sen. Hatch) ("The crushing burden of these frivolous suits is not only costly, but makes it difficult for courts to consider meritorious claims."); *id.* at 38,276 (Sen. Kyl) ("If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners."); *id.* at 20,992 (Sen. Reid) ("I am going to push hard for this legislation. Our judges ought to be spending more time hearing meritorious cases."). It is "[b]eyond doubt" that Congress enacted the PLRA "to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

The attorney fee provisions of 42 U.S.C. § 1997e(d) were part of this effort at separating the frivolous from the meritorious prisoner suits. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006). The effect of these provisions was to ensure that lawyers have a financial stake in the quality of their cases. They get paid only if they win, and they receive only as much compensation as is directly and proportionately related to the relief they secure. These provisions were intended to deter counsel from taking on prisoner cases that lack merit, and to encourage counsel to represent prisoners in the meritorious cases.[2]

The assistance of counsel in meritorious cases is crucial, because prisoners are in no position to litigate these cases themselves. A person who is incarcerated cannot conduct most kinds of investigations or interview most witnesses. Prisoners are usually indigent, so they cannot pay for litigation expenses such as deposition costs or expert fees. Many prisoners lack sufficient literacy to prepare the necessary documents. It is not surprising that pro se prisoners fare very poorly in litigation, and that hiring a lawyer greatly improves a prisoner's chance of success. Schlanger, *Inmate Litigation*, 1610-12.

To ensure that lawyers have a financial incentive to represent prisoners in meritorious cases, Congress preserved fee-shifting under section 1988 to the extent fees are "directly and reasonably incurred in proving an actual violation of the plaintiff's rights."

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[2] Funding from the Legal Services Corporation may not be used to litigate on behalf of prisoners. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(15), 110 Stat. 1321, 1321-55 (1996). To receive any compensation, prisoners' attorneys have to win.

42 U.S.C. § 1997e(d)(1)(A). Congress also preserved the ability of counsel to take cases on a contingent fee, without placing any cap on the percentage counsel may charge. *Id.* § 1997e(d)(4). (A contingent fee is necessary when cases settle, because statutory fees are not available under 42 U.S.C. § 1988 in such cases.) This uncapped contingent fee for suits by prisoners stands in sharp contrast with the analogous provision for suits under the Federal Tort Claims Act, which caps contingent fees at 25 percent of the judgment, 28 U.S.C. § 2678; with the analogous provision for suits under the Veterans' Benefits Act, which caps contingent fees at 20 percent of the judgment, 38 U.S.C. § 5904(d)(1); and with a handful of similar limits on contingent fees in other areas, 22 U.S.C. § 1623(f); 48 U.S.C. § 1424c(f); 50 U.S.C. § 4317.

For fee-shifting to be effective in providing prisoners with counsel, the fee must be "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010). In the attorney fee provisions of the PLRA, it is clear that Congress aimed not just to discourage lawyers from representing prisoners in weak cases, but also to encourage lawyers to represent prisoners in strong ones.

Section 1997e(d)(2) advances this purpose as well. By exercising their discretion to choose the "portion of the judgment (not to exceed 25 percent)" to be applied to attorney's fees, district courts are able to ensure that prisoners keep a greater share of their recovery, and that defendants pay more, in the more egregious cases. These are the cases where there is greatest reason to deter culpable conduct on the part

of prison officials, and the greatest need for prisoners to retain counsel to help them obtain relief.

The district courts have been exercising their discretion to provide these incentives. Where the defendant's conduct is particularly shocking or blameworthy, district courts often apportion less than 25 percent of the judgment to attorney's fees. *See, e.g.*, *Percelle v. Pearson*, 2017 WL 2688073, *8 (N.D. Cal. 2017) (determining that 10 percent is "an amount that reflects the degree of Defendants' culpability and the potential that a fee award may deter other correctional officers"); *Rodriguez v. Cty. of Los Angeles*, 96 F. Supp. 3d 1012, 1026 (C.D. Cal. 2014) (apportioning 1 percent because the defendants committed acts of "malicious violence leaving some Plaintiffs permanently injured"); *Hernandez v. Goord*, 2014 WL 4058662, *13 (S.D.N.Y. 2014) (apportioning 5 percent because that amount "is sufficiently small that it will neither detract from the jury's decision to punish defendants by awarding punitive damages, nor deter prisoners from bringing meritorious claims in the future"); *Blake v. Maynard*, 2013 WL 3659421, *2 (D. Md. 2013) (apportioning a nominal $1 because the defendant prison guard acted "maliciously and sadistically"); *Dykes v. Mitchell*, 2009 WL 3242006, *2 (E.D. Mo. 2009) (apportioning 5 percent because "the degree of defendant Mitchell's culpability was high" and because "an award of attorneys' fees against Mitchell could deter other persons acting under similar situations"); *Hall v. Terrell*, 648 F. Supp. 2d 1229, 1231, 1236-37 (D. Colo. 2009) (apportioning 10 percent where the prisoner was a victim of "sexual abuse and a brutal rape" by a prison guard); *Farella v. Hockaday*, 304 F. Supp. 2d 1076,

1081-82 (C.D. Ill. 2004) (apportioning 10 percent because defendant prison guard "initiated the incident maliciously, to harm Plaintiff for not cooperating as his 'stool pigeon'").

Our case is a good example. Respondents handcuffed Charles Murphy and administered such a savage beating that they crushed his eye socket. To this day, six years later, his vision remains doubled and blurred. The jury recognized respondents' culpability by awarding punitive damages. This is exactly the kind of case in which one would expect the district court to apportion less than the maximum 25 percent.

By contrast, where the defendant's conduct is less egregious, the district courts often apportion the maximum 25 percent. *See, e.g.*, *Perry v. Roy*, 2016 WL 1948823, *7 (D. Mass. 2016) (apportioning 25 percent in suit against prison nurses who failed to examine prisoner's injury); *Harris v. Hobbs*, 2013 WL 6388626, *2 (N.D. Fla. 2013) (apportioning 25 percent because "[o]n the spectrum of constitutional violations for which attorney's fees can be awarded, the violations here fall toward the end warranting less, not more, deterrence. None of the violations warrant the extra dose of deterrence that would come from declining to require Mr. Harris to bear his own fees up to the maximum permissible 25% of the underlying judgment.").[3]

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[3] The Eighth Circuit has suggested that district courts should consider four factors: (1) the degree of the parties' culpability, (2) the parties' ability to pay attorney's fees, (3) the deterrent value of requiring the defendant to pay, and (4) the relative merit of the parties' positions. *Kahle v. Leonard*, 563 F.3d 736, 743 (8th Cir. 2009). District courts may also consider "other

In their Brief in Opposition (BIO 16-17), respondents worried that a literal interpretation of the statute will engender collateral litigation over the appropriate percentage of the judgment to be applied to attorney's fees. This worry is unfounded. We now have more than twenty years of experience under section 1997e(d)(2). The district courts typically *apportion* attorney's fees at the same time they determine the appropriate *amount* of attorney's fees. Determining the amount of fees requires some care, because the court must calculate a reasonable number of hours and the correct hourly rate. But once the court has made these decisions, choosing the appropriate percentage of the judgment the plaintiff should pay takes very little time. By that point, the court has already presided over the case from start to finish. The court already knows everything about the case. No additional litigation is required.

Our case is again a good example of how the district courts address this issue. After considering the submissions of the parties, the district court carefully determined the reasonable hourly rate, Pet. App. 20a-22a, and the reasonable number of hours worked, Pet. App. 22a-26a. After making these determinations, the district court turned to apportion-

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relevant considerations," and they "need not mechanically apply these factors," because they have "broad discretion in determining an appropriate percentage under § 1997e(d)(2)." *Id.* In practice, the Eighth Circuit's standard differs little from an assessment of the defendant's culpability. Factors (1), (3), and (4) are just different ways of restating that assessment. Factor (2) is identical in virtually all cases, because the plaintiff is almost always an indigent prisoner, while the defendants in these cases are state prison employees whose attorney's fees are normally paid by the state.

ment under section 1997e(d)(2). Pet. App. 27a. The court already knew the facts of the case, having just presided over the trial. Without any additional litigation, the court determined that 10 percent would be an appropriate share of the attorney's fees for the plaintiff to pay. Pet. App. 27a.

The problem Congress sought to solve in the PLRA was not that district judges were exercising too much discretion over attorney's fees. The problem was that prisoners were filing too many frivolous suits. The district judges were meant to be part of the *solution*: The PLRA empowered them to shed the weaker cases and facilitate the stronger ones. Using their discretion to apply "a portion of the judgment (not to exceed 25 percent)" to the attorney's fees, along with the other tools they acquired under the PLRA, the district courts have been doing just that.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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APPENDIX

42 U.S.C.A. § 1997e

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 19881 of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)

(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18 for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 19881 of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such

waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

RECORD AND BRIEFS

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In the Supreme Court of the United States

CHARLES MURPHY,
PETITIONER,

v.

ROBERT SMITH AND GREGORY FULK,
RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

The Prison Litigation Reform Act (PLRA) provides that, when a prisoner obtains a monetary judgment, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant," and that "the excess shall be paid by the defendant." 42 U.S.C. § 1997e(d)(2).

The question presented is whether § 1997e(d)(2) requires that the attorney's fee award be satisfied from the judgment, with the defendant liable for any fees in excess of 25 percent of the judgment.

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141 Cong. Rec. H15166–67 (Dec. 19, 1995).....22

Other Authorities:

47 Am. Jur. *Judgments* § 443 (1995).....8

Black's Law Dictionary (10th ed. 2014).....8

Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. Pa. L. Rev. 2043 (2010).....20, 29

Model Rules of Professional Conduct r. 6.1 (Am. Bar Ass'n 2014).....26

Bernard D. Reams, Jr. & William H. Manz, *A Legislative History of the Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321* (1997).....22

BRIEF FOR RESPONDENTS

RELEVANT STATUTORY PROVISION

The appendix attached to petitioner's brief contains the complete text of 42 U.S.C. § 1997e(d). Pet. 1a–4a. Section 1997e(d)(2) provides:

> Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

INTRODUCTION

When Congress enacted the attorney's fee provisions of the PLRA, it sought to put prisoners in roughly the same position as members of the general public when deciding whether to file a lawsuit. To that end, it required a prisoner who wins a monetary judgment to pay a portion of the judgment, capped at 25 percent, to his attorney. If the fee award is less than 25 percent of the judgment, the prisoner keeps more. If the fee award is greater than 25 percent of the judgment, the defendant has to pay the difference. This compromise solution—more generous to prisoners than the American Rule whereby each party pays its own counsel but less generous than fee-shifting under 42 U.S.C. § 1988—closely aligns prisoners' incentives with those of members of the general public weighing whether to enter into a contingent fee agreement.

This straightforward reading of the PLRA is dictated by the text of the relevant provision, which states that "a portion of the judgment (not to exceed 25 percent) *shall be applied to satisfy the amount of attorney's fees* awarded against the defendant." 42 U.S.C. § 1997e(d)(2) (emphasis added). This interpretation harmonizes § 1997e(d)(2) with the PLRA's other fee-related provisions. It is confirmed by the statute's legislative history. And it is consistent with the PLRA's purposes not only to align prisoners' litigating incentives with those of the general public but also to reduce the cost of prison litigation to government defendants.

Petitioner asks the Court to read § 1997e(d)(2) as conferring discretion on the district court to choose any amount from the judgment to apply to fees, from one penny to 25 percent of the judgment. But this reading is unmoored from the statute's mandatory text, including its mandate that part of the judgment be used to "satisfy the amount of attorney's fees awarded." It overlooks the ways in which the PLRA was designed to constrain judicial discretion with respect to attorney's fees, and it fails to promote that statute's purpose of reducing prison litigation. This Court should reject it.

STATEMENT OF THE CASE

1. At the relevant time, petitioner Charles Murphy was an inmate in the custody of the Illinois Department of Corrections incarcerated at Vandalia Correctional Center in Vandalia, Illinois. Pet. App. 1a. He filed a lawsuit against respondents Robert Smith and Gregory Fulk, as well as two other correctional officers, stemming from an incident on July 25, 2011, in which petitioner alleged that the

officers violated the Eighth Amendment and state law by striking him and leaving him in a cell without medical treatment. *Id.*

Petitioner's case was tried to a jury. Pet. 17a. The jury found in favor of petitioner and against respondent Smith on petitioner's Eighth Amendment excessive-use-of-force and state-law battery claims. Dist. Ct. Doc. 142 at 1, 4. The jury awarded petitioner $48,001 in compensatory damages and $193,000 in punitive damages on those claims. *Id.* at 2, 4. The jury found in favor of petitioner and against respondent Fulk on petitioner's Eighth Amendment deliberate-indifference claim and awarded petitioner $750 in compensatory damages and $168,000 in punitive damages. *Id.* at 6–7. Judgment was entered against Smith in the amount of $241,001 and against Fulk in the amount of $168,750. Dist. Ct. Doc. 143.

After a post-trial motion, the district court remitted the compensatory damages against Smith from $40,001 to $30,983.82. Dist. Ct. Doc. 175 at 20. The court also remitted the punitive damages award against Fulk from $168,000 to $75,000. *Id.* Based on the remittitur, the court found that petitioner was entitled to judgment in the amount of $307,734.82. *Id.* at 21.

2. Petitioner sought attorney's fees at a rate of $350 an hour for a total of $214,298. Pet. App. 18a–19a. Petitioner's counsel submitted a notice of attorney's lien to the Illinois Department of Corrections in which counsel stated that petitioner had agreed to pay him "a sum equal to one-third of whatever amount may be recovered [by petitioner] plus my attorney fees relative to 42 U.S.C. 1988 and 745 ILCS 10/9-102 from suit or settlement." Dist. Ct.

Doc. 158-1. The district court held that under 42 U.S.C. § 1997e(d)(3) the allowable hourly rate was capped at between $165 and $190.50 per hour, depending on when the work was performed. Pet. App. 21a. After determining that the lodestar amount of attorney's fees to be awarded was $108,446.54, the district court then consulted 42 U.S.C. § 1997e(d)(2) to determine what portion of the monetary judgment had to be applied to satisfy the fee award. Pet. App. 27a. Respondents argued that because the fee award was greater than 25 percent of the monetary judgment, § 1997e(d)(2) required 25 percent of the judgment to be applied to the fee award, relying on the Seventh Circuit's decision in *Johnson v. Daley*, 339 F.3d 582 (7th Cir. 2003) (en banc). Pet. App. 27a. The district court, however, found that "the language [in *Johnson*] suggesting that the full 25% allowed by the PLRA must first come from the judgment is dicta." *Id.* The court then found, without any explanation of its reasoning, that petitioner "shall pay 10% of the judgment or $30,773.48 towards the attorney's fees." *Id.*

3. Respondents appealed the district court's determination of the fee apportionment issue and another issue not relevant here. Pet. App. 1a. The Seventh Circuit held that in *Johnson* it had "explained that § 1997e(d)(2) required that 'attorneys' compensation come first from the damages.'" Pet. App. 13a (quoting *Johnson*, 339 F.3d at 585) (internal brackets omitted). Under the Seventh Circuit's interpretation of the statute, "[o]nly if 25% of the award is inadequate to compensate counsel fully does the defendant contribute more to the fees." *Id.* (internal quotation marks omitted). The court concluded that this "is the most natural reading of the

statutory text" and that the statute did not "contemplate[ ] a discretionary decision by the district court" because § 1997e(d)(2) "neither uses discretionary language nor provides any guidance for such discretion." *Id.* The court remanded the case to the district court to modify its judgment to apply $76,933.46 from the judgment "toward satisfying the attorney fee the court awarded." Pet. App. 13a–14a.

SUMMARY OF ARGUMENT

Under 42 U.S.C. § 1997e(d)(2), when a prisoner obtains a monetary judgment, the district court must satisfy the attorney's fee award from the judgment, with the defendant liable for any fees in excess of 25 percent of the judgment.

I. The text of statute provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant" and that "the excess shall be paid by the defendant." 42 U.S.C. § 1997e(d)(2). "Shall" is a mandatory term, and the verb "to satisfy" refers to the fulfillment of an obligation. The plain language of § 1997e(d)(2) thus requires the district court to look first to the judgment to fulfill the fee award. The parenthetical phrase "not to exceed 25 percent" reflects Congress's expectation that some fee awards will be satisfied by applying less than 25 percent of the judgment; in such cases, the applied portion is less than 25 percent of the judgment. In all cases, however, the prisoner's liability for statutory attorney's fees is capped at 25 percent of the judgment and the defendant is liable for the remainder, up to the overall statutory cap of 150 percent of the judgment. *Id.*

Petitioner asks this Court to adopt a reading of § 1997e(d)(2) under which district courts may choose any portion of the judgment up to 25 percent to apply to the fee award. That interpretation fails to give effect to the statute's mandatory language and presupposes a degree of judicial discretion that § 1997e(d)(2)'s text neither confers nor channels. Respondents' nondiscretionary interpretation of § 1997e(d)(2), by contrast, gains support from the other provisions of § 1997e(d)—all of which limit both the defendant's fee liability and the district court's discretion—and from the general presumption against fee-shifting.

II. The second sentence of § 1997e(d)(2) as originally introduced in the Senate confirms that the defendant is not liable for attorney's fees unless the fee award is greater than 25 percent of the judgment. Although the Conference Committee altered the second sentence to address a different topic, there is no reason to infer from that unexplained decision that Congress changed its mind about the meaning of the first sentence, which is at issue here.

III. The nondiscretionary interpretation of § 1997e(d)(2) serves the purposes of the PLRA. It deters prisoners from filing marginal suits by roughly aligning their litigation incentives with those of non-prisoners, and it reduces the cost to governments of prison litigation by limiting defendants' fee liability. Petitioner is wrong to argue that his discretionary reading will encourage lawyers to take up meritorious prison cases; attorneys' incentives remain the same regardless of who pays their fee. Nor is § 1997e(d)(2) designed to deter wrongful conduct. That is the function of punitive damages, not fee-shifting.

Finally, the nondiscretionary reading of § 1997e(d)(2) is not inequitable. Rather, it represents a modest departure from the American Rule in prisoners' favor.

ARGUMENT

I. The PLRA's text requires that the attorney's fee award be satisfied from the judgment, with the defendant liable for any fees in excess of 25 percent of the judgment.

A. The text of § 1997e(d)(2) does not confer discretion on the district court to choose a portion to be applied from the judgment.

In matters of statutory construction, courts must "begin 'with the language of the statute.'" *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (quoting *Barnhart v. Sigeman Coal Co.*, 534 U.S. 438, 450 (2002)). The first sentence of § 1997e(d)(2) provides that, when a monetary judgment is awarded in a case governed by the PLRA, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2). This language requires the district court to set aside a portion of the judgment to pay the amount of fees awarded. The parenthesized phrase "not to exceed 25 percent," in conjunction with the second sentence of § 1997e(d)(2), makes clear that if 25 percent of the judgment is not enough to satisfy the fee award "the excess shall be paid by the defendant." *Id.*

Section 1997e(d)(2) uses mandatory language. The word "shall" "usually connotes a requirement" because "shall" means "must." *Kingdomware Techs.*,

136 S. Ct. at 1977. Thus, § 1997e(d)(2) "creates a mandatory rule," *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016), that district courts must follow in determining who is liable to pay attorney's fees in PLRA cases. Although petitioner acknowledges that the word "shall" is mandatory, he contends that Congress's choice of that word is immaterial because "'shall' modifies 'be applied,' not the percentage." Pet. Br. 9. But petitioner stops too soon, for the rest of the operative sentence provides that a portion of the judgment "shall be applied *to satisfy the amount of attorney's fees awarded against the defendant*." 42 U.S.C. § 1997e(d)(2) (emphasis added).

By using the phrase "to satisfy the amount of attorney's fees awarded," Congress directed that a portion of the judgment must be applied to fulfill the fee award. "Satisfaction" means the "giving of something with the intention, express or implied, that it is to extinguish some existing legal or moral obligation," as well as the "fulfillment of an obligation; esp. the payment in full of a debt." *Black's Law Dictionary* (10th ed. 2014) ("satisfaction"). Similarly, "satisfaction of judgment" means "[t]he complete discharge of obligations under a judgment," *id.* ("satisfaction of judgment"), or "the final act and end of a proceeding," 47 Am. Jur. *Judgments* § 443 (1995). Generally, then, satisfaction of the attorney's fee award means complete payment of that award. *Cf. Bofinger v. Tuyes*, 120 U.S. 198, 204–05 (1887) (explaining that "accord and satisfaction" is "equivalent to payment").

Throughout the United States Code, Congress routinely uses the verb "to satisfy" to refer to the

fulfillment of an obligation. *See, e.g.*, 15 U.S.C. § 78fff-3(a) (requiring the Securities Investor Protection Corporation to "advance to the trustee such moneys, not to exceed $500,000, as may be required to pay or otherwise satisfy" net equity claims of customers of the debtor); 26 U.S.C. § 6322 (tax lien created under the Internal Revenue Code "shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time"); 28 U.S.C. § 3201(a) (judgment in a civil action creates a judgment lien on the judgment debtor's property "for the amount necessary to satisfy the judgment, including costs and interest").

Moreover, federal statutes often specify an auxiliary funding source in the event that the primary source is inadequate to satisfy a statutory obligation. For instance, when Congress created the Securities and Exchange Commission Investor Protection Fund to pay approved awards to whistleblowers, it provided that if the amount in the Fund is not "sufficient to satisfy an award" under the whistleblower statute, an amount equal to the "unsatisfied portion of the award" shall be deposited into the Fund from any monetary sanction collected by the Commission. 15 U.S.C. § 78u-6(g)(3)(B). Similarly, Congress provided that the Federal Savings and Loan Insurance Corporation Resolution Fund is to be funded by enumerated sources, but that if those sources "are insufficient to satisfy the liabilities" of that Fund, the Secretary of the Treasury must pay the necessary amounts into the Fund. 12 U.S.C. § 1821a(c)(1).

That is what Congress did here. The first sentence of § 1997e(d)(2) designates a primary funding source for the attorney's fee award, directing the district court to "satisfy the amount" of the award using "a portion of the judgment (not to exceed 25 percent)." 42 U.S.C. § 1997e(d)(2). The second sentence then identifies an auxiliary source, specifying that if 25 percent of the judgment is not enough to satisfy the award, "the excess shall be paid by the defendant," so long as the overall fee award is not greater than 150 percent of the judgment. *Id.* This straightforward interpretation gives meaning to all of § 1997e(d)(2)'s words.

Petitioner's interpretation, by contrast, fails to account for the statutory text that follows the word "applied." He argues that the phrase "not to exceed 25 percent" confers discretion on the district court to choose any portion of the judgment up to 25 percent—and presumably down to as little as one cent—to put toward the fee award. Pet. Br. 9–11. This reading ignores the statute's directive that the portion be applied "to satisfy the amount of attorney's fees awarded against the defendant." 42 U.S.C. § 1997e(d)(2).[1]

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[1] Lower courts that have adopted petitioner's interpretation of § 1997e(d)(2) sometimes apply only one dollar of the judgment to the fee award. *See, e.g.*, *Berrian v. City of New York*, No. 13CV1719 DLC, 2014 WL 6604641, at *6 (S.D.N.Y. Nov. 21, 2014) (applying one dollar, or 0.0015%, of $65,000 judgment to fee award); *Murphy v. Gilman*, No. 03-145, 2008 WL 2139611, at *1, *3 (W.D. Mich. May 20, 2008) (applying one dollar, or .000036%, of $2,750,000 judgment to fee award); *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 815, 823 (E.D. Mich. 2006) (applying one dollar, or 0.00046%, of $219,000 judgment to fee award); *Morrison v. Davis*, 88 F. Supp. 2d 799, 812–13 (S.D. Ohio 2000), amended in part, 195 F. Supp. 2d 1019 (S.D. Ohio 2001) (applying one dollar,

In his brief, petitioner offers no account of the meaning of the phrase "to satisfy the amount of attorney's fees awarded against the defendant." His reading of § 1997e(d)(2) simply treats those words as superfluous. This Court has made clear time and time again that such interpretations should be rejected. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("The rule against superfluities complements the principle that courts are to interpret the words of a statute in context."); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (it is the court's "duty to give effect, if possible, to every clause and word of a statute") (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)) (internal quotation marks omitted).

To be sure, even under respondents' interpretation of § 1997e(d)(2), 25 percent of the judgment will not always be sufficient to fully satisfy the fee award; that is why the second sentence requires the defendant to pay any excess amount. But on petitioner's account, district courts need not even *try* to satisfy the fee award from the judgment. Instead, they are apparently free to treat the application of § 1997e(d)(2) as an opportunity to dispense justice *ad hoc*, calibrating the allotted portion of the judgment upward or downward in a standardless effort to "deter culpable conduct." Pet. Br. 21. That reading of § 1997e(d)(2) is not supported by the statute's text.

Likewise, the Court should reject petitioner's strained suggestion that respondents interpret the parenthetical phrase "not to exceed 25 percent" to mean "*exactly 25 percent*." Pet. Br. i (emphasis in original). That phrase simply reflects Congress's

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or 0.0067%, of $15,000 judgment to fee award).

expectation that some fee awards will be satisfied by applying less than 25 percent of the judgment. If 10 or 20 percent of the judgment is enough to satisfy the fee award, that is all that need be applied.[2]

For the same reason, petitioner's analogy about the length of briefs (Pet. Br. 10) misses the mark. Of course, a brief of 14,999 (or, for that matter, 100) words complies with a court order directing, without more, that briefs are "not to exceed 15,000 words." But § 1997e(d)(2) does more than just require the district court to set aside a portion of the judgment "not to exceed 25 percent"—it requires the court to apply that portion "to satisfy the amount of attorney's fees awarded." 42 U.S.C. § 1997e(d)(2). In that regard, a more apt analogy is an insurance deductible requiring that any covered charges be satisfied by the insured up to a deductible amount "not to exceed $500," with the excess to be paid by the insurer. No one would contend that the "not to exceed" language confers discretion on the insured to pay whatever she chooses

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[2] Congress's expectation has been borne out: in many cases, prisoners have obtained judgments that are more than four times as large as the fee award. *See, e.g.*, *Kahle v. Leonard*, 563 F.3d 736, 742 (8th Cir. 2009) (awarding judgment of $1.1 million and fees of $186,208.88); *Key v. Kight*, No. 6:14-CV-39, 2017 WL 915133, at *9 (S.D. Ga. Mar. 8, 2017), report and recommendation adopted, No. 6:14-CV-39, 2017 WL 1128601 (S.D. Ga. Mar. 24, 2017) (awarding $274,800 in damages and $11,851.88 in fees); *Kensu v. Buskirk*, No. 13-10279, 2016 WL 6465890, at *5–6 (E.D. Mich. Nov. 1, 2016) (judgment of $325,002; fee award of $54,422.39); *Thompson v. Torres*, No. CIV. A. 00-10981-RWZ, 2010 WL 4919058, at *1–2 (D. Mass. Nov. 29, 2010) ($175,001 in damages; $17,661.75 in fees); *Murphy*, 2008 WL 2139611 at *3 (damages of $2.75 million; fee award of $205,814.38).

toward a thousand-dollar doctor's bill so long as the chosen amount is less than or equal to $500.

In the end, petitioner's understanding of § 1997e(d)(2) corresponds to a statute Congress did not write. Tellingly, for example, petitioner asserts that the statute "specifies that any '*portion* of the judgment,' up to 25 percent, shall be applied to satisfy the attorney's fees." Pet. Br. 11 (emphasis in original). But § 1997e(d)(2) does not say that "*any* portion" of the judgment up to the cap may be applied; rather, it states that "a portion" not to exceed 25 percent shall be applied to satisfy the fee award. 42 U.S.C. § 1997e(d)(2). The word "any" implies a discretion that Congress did not confer. Similarly, although Congress could have adopted petitioner's preferred reading by providing that the district court shall apply a portion of the monetary judgment not to exceed 25 percent "toward" the fee award or "to pay a part of" the fee award, it did neither of those things. Instead, Congress required the district court to apply a portion of the judgment to satisfy the amount of attorney's fees awarded, subject to the proviso that if the fee award exceeds 25 percent of the judgment the defendant is liable for the rest.

That simple reading is confirmed by the striking absence from § 1997e(d)(2) of language conferring discretion on the district court. Petitioner contends (Pet. Br. 9) that the phrase "not to exceed 25 percent" counts as "discretionary language" but, as explained above, that is not so: that phrase merely places a cap on the portion of the judgment that must be applied to satisfy the fee award. Petitioner does not even attempt to identify any other "discretionary language" in § 1997e(d)(2), and there is none. On the contrary,

the operative language that Congress chose is precise and mandatory: "a portion of the judgment (not to exceed 25 percent) *shall* be applied *to satisfy the amount of* attorney's fees awarded." 42 U.S.C. § 1997e(d)(2) (emphasis added). Nor does § 1997e(d)(2) contain any language to channel the discretion it supposedly confers, or to guide judicial review on an abuse-of-discretion standard. Likewise, although petitioner concedes that "shall" is mandatory (Pet. Br. 9), his interpretation of § 1997e(d)(2) gives that word no mandatory work to do, except perhaps to ensure that district courts apply $0.01 to the judgment as opposed to $0.00. On petitioner's account, the statute leaves district courts at large to apply as much or as little of the judgment as they please, up to 25 percent, based on criteria that petitioner fails to specify but that appear to focus on the blameworthiness of the defendant's conduct. Pet. Br. 21–23. That reading is simply not grounded in the statute's language.

Respondents' nondiscretionary interpretation of § 1997e(d)(2) gains further support when that provision's two sentences are read together. Section 1997e(d)(2) as a whole defines the circumstances in which a defendant may be liable to pay an attorney's fee award in a PLRA action. The first sentence establishes when the defendant's liability for fees *begins*: when 25 percent of the judgment is inadequate to satisfy the fee award. The second sentence establishes when that liability *ends*: when attorney's fees reach 150 percent of the judgment. 42 U.S.C. § 1997e(d)(2). Section 1997e(d)(2)'s two sentences thus work together to set a numerical trigger for, and a numerical cap on, the defendant's fee liability.

The circuit court decisions petitioner cites, Pet. Br. 12, do not support a different result. None of those decisions undertook a meaningful analysis of the statutory language or discussed the relevance of the phrase "to satisfy the amount of attorney's fees awarded." In *Shepherd v. Goord*, 662 F.3d 603, 605 n.1 (2d Cir. 2011), the Second Circuit noted that the district court's decision to apportion only 10 percent of the monetary judgment to pay the fee award was not challenged on appeal. In *Boesing v. Spiess*, 540 F.3d 886, 892 (8th Cir. 2008), the Eighth Circuit found that "the phrase 'not to exceed 25 percent' clearly imposes a maximum, not a mandatory, percentage." That court, however, did not examine the rest of the sentence, including the "to satisfy" language. *Id.* The Third Circuit in *Parker v. Conway*, 581 F.3d 198, 204–05 (3d Cir. 2009), relied on *Boesing* and likewise did not interpret the rest of the relevant sentence. And in *King v. Zamiara*, 788 F.3d 207, 218 (6th Cir. 2015), the Sixth Circuit did not explain its reading of § 1997e(d)(2) at all. These decisions offer no reason to adopt petitioner's interpretation.

Petitioner suggests that Congress implicitly ratified these decisions and similar ones from district courts by failing to repudiate them. Pet. Br. 15–16. But, of course, the lower courts are not unanimous: the Seventh Circuit has adopted the nondiscretionary interpretation of § 1997e(d)(2). *See Johnson*, 339 F.3d at 585 (en banc); *see also Riley v. Kurtz*, 361 F.3d 906, 911 (6th Cir. 2004). More fundamentally, as this Court has repeatedly cautioned, "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the courts' statutory interpretation." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive*

Communities Project, Inc., 135 S. Ct. 2507, 2540 (2015) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)) (internal quotation marks omitted). "[T]his Court has no warrant to ignore clear statutory language on the ground that other courts have done so, even if they have consistently done so for 30 years." *Id.* at 2538 (quoting *Milner v. Dep't of the Navy*, 562 U.S. 562, 575–576 (2011)) (internal quotation marks omitted).

B. Section 1997e(d) as a whole supports respondents' interpretation.

Statutory construction is a "holistic endeavor," in which the meaning of a provision may be "clarified by the remainder of the statutory scheme." *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217 (2001) (internal quotation marks omitted). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) (internal quotation marks omitted). Although the nondiscretionary reading of § 1997e(d)(2) is dictated by its plain text alone, that reading is reinforced by the other parts of § 1997e(d), all of which constrain judicial discretion in order to limit the defendant's exposure to attorney's fee liability in PLRA actions.

The four subparts of § 1997e(d) work together to impose "substantive limits on the award of attorney's fees." *Martin v. Hadix*, 527 U.S. 343, 353 (1999) (emphasis omitted). Subsection (d)(1) provides that fees cannot be awarded except to the extent that they are "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" and either

"proportionally related to the court ordered relief" or incurred in enforcing relief ordered by the court. 42 U.S.C. § 1997e(d)(1). Subsection (d)(2), of course, requires a portion of the judgment not to exceed 25 percent to be applied to satisfy the fee award; its second sentence also places an overall cap on statutory fee awards by limiting them to 150 percent of the judgment. *Id.* § 1997e(d)(2). Subsection (d)(3) caps attorney's fees at an hourly rate equal to 150 percent of the rate established for court-appointed defense counsel in criminal cases. *Id.* § 1997e(d)(3). And subsection (d)(4) makes clear that the defendant cannot be made liable for any additional fees the plaintiff may have agreed to pay his attorney. *Id.* § 1997e(d)(4).

All of the subparts of § 1997e(d) thus circumscribe the defendant's liability for attorney's fees in PLRA cases—and they all do so by constraining the district court's discretion. By enacting these provisions, Congress reversed course from the wide discretion it had previously accorded to district courts in prison cases under § 1988. *See Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (characterizing § 1997e(d) as "restricting attorney's fees"). Petitioner's discretionary reading of § 1997e(d)(2) thus not only ignores the operative text of that provision; it also clashes with the rest of § 1997e(d).[3]

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[3] Other provisions of the PLRA beyond § 1997e(d) likewise remove discretion from district courts. For instance, the statute's exhaustion requirement mandates that prisoners exhaust available administrative remedies, 42 U.S.C. § 1997e(a)(1), in contrast to the discretion previously enjoyed by district courts to decide whether to insist on exhaustion, *see Booth v. Churner*, 532 U.S. 731, 739 (2001). Similarly, the PLRA

C. Petitioner fails to overcome the presumption against fee-shifting.

In construing fee-related statutes, "background presumptions governing attorney's fees and costs are a highly relevant contextual feature." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013). The "basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015) (internal quotation marks omitted). This rule is justified by the principle that "one should not be *penalized* for merely defending or prosecuting a lawsuit." *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am.*, 456 U.S. 717, 724 (1982) (emphasis in original) (internal quotation marks omitted). While Congress has the authority to permit fee-shifting, it "legislates against the strong background of the American Rule." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994). Accordingly, fee-shifting "statutes which invade the common law are to be read with a presumption favoring the retention of long-established and familiar legal principles." *Baker Botts L.L.P.*, 135 S. Ct. at 2164 (internal quotation marks and alterations omitted); *see Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271 (1975) (explaining that the American Rule "is deeply rooted in our history and in

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sharply limits the circumstances in which district courts may order injunctive relief with respect to prison conditions. *See* 18 U.S.C. § 3626(a). As this Court has noted, "curbing the equitable discretion of district courts was one of the PLRA's principal objectives." *Miller v. French*, 530 U.S. 327, 339 (2000).

congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs" other than as required by statute).

It is true that in § 1988 Congress authorized the award of attorney's fees to the prevailing party in actions to enforce federal civil rights laws. 42 U.S.C. § 1988(b); *see Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 (2010). And as this Court has observed, § 1988 contemplated "that a plaintiff's recovery will not be reduced by what he must pay his counsel." *Blanchard v. Bergeron*, 489 U.S. 87, 94 (1989). But that statute is of no help to petitioner, because the PLRA expressly *limits* § 1988 in the specific context of prisoner suits, narrowing the permissible scope of fee awards compared to what would otherwise be available under that more general statute. *See Martin*, 527 U.S. at 347. Hence, the very first sentence of § 1997e(d) provides that "[i]n any action brought by a prisoner . . . in which attorney's fees are authorized under section 1988 of this title, such fees *shall not be awarded*" except under specified circumstances. 42 U.S.C. § 1997e(d)(1) (emphasis added). And as described in Section I.B *supra*, all four subparts of § 1997e(d) work together to limit fees paid by defendants in prison cases and to curtail the discretion that § 1988 had previously conferred on district courts in such cases. If anything, then, § 1997e(d)(2)'s placement in the PLRA adds force to the usual presumption against broadly construing fee-shifting statutes.

On respondents' interpretation, § 1997e(d)(2) is broadly consonant with the American Rule: if the award of attorney's fees does not exceed 25 percent of the monetary judgment, the prisoner has to pay his

own lawyer, just like an ordinary non-incarcerated litigant. To the extent that § 1997e(d)(2) diverges from the American Rule, it does so in a way that favors the prisoner: if the fee award exceeds 25 percent of the judgment, the defendant is liable for the excess. By placing the threshold for fee-shifting at 25 percent of the judgment, Congress put prevailing prisoners in a somewhat better position than prevailing non-prisoner plaintiffs in personal injury cases, who typically pay 33 to 40 percent of their damage awards to counsel. *See* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. Pa. L. Rev. 2043, 2083 n.9 (2010) (describing typical contingent fees ranging from 33 to 40 percent); *see US Airways, Inc. v. McCutchen*, 569 U.S. 88, 92 (2013) (personal-injury case involving 40 percent contingent fee). And § 1997e(d)(4) preserves prisoners' ability to enter into contingent fee agreements on top of any statutorily authorized fee award. 42 U.S.C. § 1997e(d)(4).

Petitioner's interpretation, by contrast, represents a marked departure from the American Rule: depending on the district court's discretionary choice, the prevailing prisoner may have to pay his lawyer as little as one cent. Even if § 1997e(d)(2) were ambiguous, petitioner has not come close to overcoming the "presumption favoring the retention of long-established and familiar legal principles" such as the American Rule and the benchmark provided by the standard contingent fee arrangement. *Baker Botts L.L.P.*, 135 S. Ct. at 2164 (internal quotation marks and alterations omitted).

II. The legislative history of § 1997e(d)(2) confirms respondents' interpretation.

Resort to legislative history is unnecessary where, as here, the statute's meaning is clear. *Mohamed v. Palestinian Auth.*, 566 U.S. 449, 458–59 (2012) (citing *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 236 n. 3 (2010)). Still, if additional evidence of legislative intent were needed, the legislative history of § 1997e(d)(2) confirms respondents' interpretation. The precursor to § 1997e(d)(2) provided in full as follows:

> Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. *If the award of attorney's fees is greater than 25 percent of the judgment, the excess shall be paid by the defendant.*

Prison Litigation Reform Act of 1995, S. 1279, 104th Cong., § 7(d)(2) (1995) (emphasis added). The first sentence is identical to the first sentence of § 1997e(d)(2) as enacted. The second sentence confirms that the defendant is liable for attorney's fees only if the fee award is greater than 25 percent of the judgment.

A version of the PLRA that included the language reproduced above was later included in an amendment to an appropriations bill, H.R. 2076. *See* H.R. 2076, 104th Cong. § 7(d)(2) (public print, Oct. 10, 1995). The pertinent language of the second sentence of § 1997e(d)(2) was subsequently altered without explanation in a conference report. *See* H.R. Rep. No.

104-378, at 71 (Dec. 1, 1995) (Conf. Rep.); H.R. Res. 289, 104th Cong. (1995). *See generally* Bernard D. Reams, Jr. & William H. Manz, *A Legislative History of the Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321* (1997).

During the ensuing discussion of H.R. 2076, two of its sponsors explained that the new version of the PLRA achieved the same litigation reforms embodied in the earlier version. *See* 141 Cong. Rec. S18136 (Dec. 7, 1995) (statement of Sen. Hatch) ("The conference bill also contains legislation I introduced with the distinguished majority leader to reform frivolous prison litigation."); *see also* 141 Cong. Rec. S18296 (Dec. 8, 1995) (statement of Sen. Abraham) ("These provisions are based on legislation that I have worked on assiduously along with the distinguished chairman of the Judiciary Committee, Senator Hatch, the majority leader, and Senators Hutchinson and Kyl."). H.R. 2076 was passed by both chambers but vetoed by the president. 141 Cong. Rec. H15166–67 (Dec. 19, 1995). The PLRA provisions from the conference report accompanying H.R. 2076 were then included, without change to the relevant language, in a new bill, H.R. 3019. That bill was passed by both houses of Congress and signed into law by the president on April 26, 1996. Prison Litigation Reform Act of 1996, Pub. L. No. 104–134, 110 Stat. 1321 (1996). The second sentence of § 1997e(d)(2) now reads: "If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." 42 U.S.C. § 1997e(d)(2).

In short, the second sentence of § 1997e(d)(2) as originally introduced in the Senate confirmed respondents' reading of the first sentence: the district

court must satisfy the fee award from a portion of the judgment, but if the fee award exceeds 25 percent of the judgment, the defendant must pay the rest. The Conference Committee then made an unexplained decision to devote the second sentence of § 1997e(d)(2) instead to establishing an overall cap on attorney's fee awards. But it would be odd to infer from that revision of the *second* sentence any change in the meaning of the *first*. Quite the contrary: the most plausible inference is that members of the Conference Committee believed that the first sentence adequately expressed the rule that the defendant does not become liable for attorney's fees until the fee award reaches 25 percent of the judgment, so that they were free to repurpose the second sentence to impose an overall 150 percent cap.

Lower courts have noted that Congress used grammatically awkward language to express an outright 150 percent cap in the second sentence of § 1997e(d)(2). *See, e.g.*, *Foulk v. Charrier*, 262 F.3d 687, 703 (8th Cir. 2001); *Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001). The fact that the second sentence was revised so clumsily by the Conference Committee makes it even less plausible that the revision was carefully worded to affect the meaning of the preceding sentence. Overall, then, there is no reason to conclude that Congress intended to depart from the plain meaning of § 1997e(d)(2) that is confirmed by the Senate's original version.

III. The nondiscretionary interpretation of § 1997e(d)(2) promotes the purposes of the PLRA.

Enacted "in the wake of a sharp rise in prisoner litigation in the federal courts," the PLRA was

designed to "bring this litigation under control." *Woodford*, 548 U.S. at 84. Congress's overriding purpose was "to reduce the quantity . . . of prisoner suits." *Id.* (quoting *Porter v. Nussle*, 534 U.S. 516, 524 (2002)) (internal quotation marks omitted; ellipsis in *Woodford*). *See also Jones v. Bock*, 549 U.S. 199, 202 (2007) (PLRA was enacted "[i]n an effort to address the large number of prisoner complaints filed in federal court"). By reducing the overall amount of prison litigation, Congress sought to pursue "the twin goals of decreasing marginal lawsuits and protecting the public fisc." *Walker*, 257 F.3d at 669 (citing *Hadix v. Johnson*, 230 F.3d 840, 845 (6th Cir. 2000)). Respondents' nondiscretionary interpretation of § 1997e(d)(2) serves both of these goals.

A. The nondiscretionary interpretation of § 1997e(d)(2) discourages prisoners from filing marginal lawsuits.

As the PLRA's congressional sponsors recognized, one way to discourage prisoners from filing marginal lawsuits is to make sure that they face the same considerations other citizens face when deciding whether to file suit. Thus, Senator Kyl noted that under the PLRA "[p]risoners will have to make the same decision that law-abiding Americans must make: Is the lawsuit worth the price?" 141 Cong. Rec. S7526 (May 25, 1995). Senator Dole explained that the PLRA sought to place prisoners on a more equal footing with non-incarcerated plaintiffs when it came to paying the "costs associated with a lawsuit." 141 Cong. Rec. S14413 (Sept. 27, 1995). Section 1997e(d)(2) was crafted to align prisoners' incentives with those of would-be plaintiffs outside of prison in precisely this way. Just as members of the general

public often have to choose whether to agree to pay an attorney a fixed percentage of any award before filing an action, under § 1997e(d)(2) a prisoner can expect to pay 25 percent of the judgment to his attorney if the fee award is at least 25 percent of the judgment. Performing this familiar calculus would likely make at least some prisoners with marginal claims think twice about filing a lawsuit.

Petitioner argues that his discretionary reading serves the PLRA's purpose of discouraging marginal lawsuits while not discouraging meritorious ones. Pet. Br. 19–25. In particular, he argues that the attorney's fee provisions of the PLRA are aimed at encouraging lawyers to represent prisoners in strong cases, and that his interpretation of § 1997e(d)(2) "advances this purpose as well." Pet. Br. 21.[4]

But § 1997e(d)(2) has nothing to do with encouraging lawyers to represent prisoners. A lawyer's financial incentives are based on the fee he can expect to recover, and that fee does not change depending on whether a greater or lesser portion of it comes from the plaintiff's judgment. The attorney will receive the awarded fee whether the portion drawn from the judgment is 25 percent or one penny. From the perspective of the lawyer's financial incentives, then, the interpretation of § 1997e(d)(2) makes no difference.[5]

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[4] Petitioner never even attempts to explain how a discretionary reading of § 1997e(d)(2) would affect the incentives of *prisoners*, as opposed to their attorneys, so as to facilitate meritorious claims while stymieing non-meritorious ones, and it is hard to see how it would.

[5] Of course, lawyers are motivated by more than just financial incentives. They are also encouraged to undertake *pro bono*

It is true, as petitioner points out (Pet. Br. 20–21), that a *different* fee-related provision of the PLRA was designed to encourage attorneys to take on stronger cases. By ensuring that prisoners may enter into uncapped contingent fee agreements, Congress safeguarded prisoners' ability to attract counsel in cases that appear to have merit. 42 U.S.C. § 1997e(d)(4). Indeed, in the non-prisoner context, this Court has recognized that the "option of promising to pay more than the statutory fee if that is necessary to secure counsel of [plaintiffs'] choice" furthers § 1988's "general purpose of enabling such plaintiffs in civil rights cases to secure competent counsel." *Venegas v. Mitchell*, 495 U.S. 82, 89–90 (1990). But petitioner never explains why the availability of uncapped contingent fees under § 1997e(d)(*4*) means that the fee apportionment formula in § 1997e(d)(*2*) has anything to do with attracting counsel.

B. The nondiscretionary interpretation of § 1997e(d)(2) reduces the cost to governments of prison litigation.

The PLRA's aim of shielding government defendants from the costs of prison litigation is evident in many of its provisions. The strict exhaustion requirement lowers government defendants' litigation costs by keeping a large proportion of prison disputes out of the court system. *See* 42 U.S.C. § 1997e(a);

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cases as part of their professional obligations. *See, e.g.*, Model Rules of Professional Conduct r. 6.1 (Am. Bar Ass'n 2014) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay."); *id.* cmt. 1 ("personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer"). But § 1997e(d)(2) has no effect on these non-economic incentives either.

Woodford, 548 U.S. at 89. The requirement that courts screen out frivolous claims at the beginning of the litigation keeps defense costs from mounting. *See* 28 U.S.C. § 1915A. The prohibition on prisoner suits for mental or emotional injury in the absence of a prior showing of a physical injury further reduces government liability. *See* 42 U.S.C. § 1997e(e). The restriction on circumstances in which federal courts can order injunctive relief with respect to prison conditions curtails federal court micromanagement of state prisons and the costs associated with it. *See* 18 U.S.C. § 3626(a). And in cases where a court appoints a special master, the PLRA shifts the burden of paying the special master from the States to the federal judiciary. *See id.* § 3626(f)(4).

Congress's focus on reducing the cost to governments of prison litigation was on display throughout the debate on the legislation as well. Senator Dole explained that prison litigation costs the States an enormous amount of money annually. 141 Cong. Rec. S14646 (Sept. 29, 1995). Senator Hatch remarked that it was "time to stop this ridiculous waste of taxpayers' money." 141 Cong. Rec. S14627 (Sept. 29, 1995). Senator Abraham stated that the people "certainly don't need [to have their money spent] on defending against endless prisoner lawsuits." 141 Cong. Rec. S14419 (Sept. 27, 1995). Senator Abraham further explained that as a result of the PLRA, "[n]o longer will attorneys be allowed to charge massive amounts to the State for the service of correcting minimal violations," and "no longer will attorneys be allowed to charge very high fees for their time." 141 Cong. Rec. S14317 (Sept. 26, 1995).

Respondents' nondiscretionary reading of § 1997e(d)(2) advances the purpose of protecting government defendants against the costs of prison litigation. By requiring the court to satisfy the fee award from the judgment so long as the award does not exceed 25 percent of the judgment, § 1997e(d)(2) limits the government's fee liability. In contrast, petitioner's reading of § 1997e(d)(2) exposes defendants to nearly absolute fee-shifting at the discretion of the district court, and thus fails to advance this core purpose.

C. The remaining arguments of petitioner and his amici lack merit.

Perhaps recognizing the weakness of his argument that § 1997e(d)(2) affects attorneys' incentives, petitioner offers a second ostensible purpose of the provision: "to deter culpable conduct on the part of prison officials." Pet. Br. 21–22; *see also* ACLU Am. Br. 6–9. He contends that § 1997e(d)(2) should be read to give district courts discretion so that "defendants pay more [] in the more egregious cases." Pet. Br. 21. But this contention misunderstands the purpose of fee-shifting. If the finder of fact has determined that defendants have engaged in "'egregious conduct,'" it may award punitive damages. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 260–61 (1984) (quoting *Smith v. Wade*, 461 U.S. 30, 49 (1983)). The function of fee-shifting, however, is to attract competent counsel and "ensure effective access to the judicial process for persons with civil rights grievances," *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quotation omitted), not to punish or deter blameworthy conduct. Appropriate fees under § 1988 are determined by the lodestar method, which

attempts to identify the reasonable hourly rate and the reasonable amount of hours spent on the case. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986). Although this Court has recognized that the lodestar figure may be augmented in rare circumstances, *Perdue*, 559 U.S. at 554, none of those circumstances includes consideration of the defendant's underlying conduct, *id.* at 554–56.

Nor does anything in the PLRA suggest an intent to confer discretion on the district court to apportion the fee award based on the defendant's conduct. Petitioner claims that Congress "virtually always authorizes district courts to exercise considerable discretion" in awarding fees. Pet. Br. 16–17. But as explained in Section I.B *supra*, all of the attorney's fee provisions in the PLRA *limit* the defendant's liability for attorney's fees in PLRA cases by *constraining* the district court's discretion as compared to the general fee-shifting rules applicable under § 1988. *See* 42 U.S.C. § 1997e(d)(1)–(4). None of these provisions refers to the nature of the underlying conduct.

Finally, notwithstanding petitioner and amici's implications to the contrary, respondents' reading of § 1997e(d)(2) is not inequitable. Rather, as noted in Section I.C *supra*, requiring the prisoner to pay 25 percent of the judgment to his lawyer (or less if the fee award is smaller than that amount) effects a modest departure from the American Rule in the prisoner's favor, since the applied portion falls short of the typical contingent fee a non-incarcerated plaintiff could expect to pay. *See* Fitzpatrick, 158 U. Pa. L. Rev. at 2083 n.9. If a contingent fee is needed to attract counsel, § 1997e(d)(4) permits the prisoner and his lawyer to

agree to one, as apparently happened here, *see* Dist. Ct. Doc. 158-1.

The argument that respondents' nondiscretionary reading is inequitable to prisoners is further undercut by the fact that the apportionment rule of § 1997e(d)(2) applies only to judgments awarding monetary relief. In cases involving solely injunctive relief, which can spur important systemic changes to prison conditions, *see, e.g.*, *Brown v. Plata*, 563 U.S. 493 (2011), there is no 25 percent apportionment, as there is no monetary judgment to apportion.[6] In addition, the PLRA has no effect on state-law claims, and States remain free to provide fee-shifting for prisoners who prevail on such claims. *See, e.g.*, Conn. Gen. Stat. Ann. § 52-251b; 740 ILCS 23/5(c); 1 Me. Rev. Stat. tit. 5, § 4683; Or. Rev. Stat. Ann. § 20.107.

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[6] Similarly, all of the courts of appeals that have addressed the issue have held that the overall 150 percent fee cap in the second sentence of § 1997e(d)(2) does not apply when solely injunctive relief is awarded. *See Kelly v. Wengler*, 822 F.3d 1085, 1101 (9th Cir. 2016); *Foulk*, 262 F.3d at 703 n.17; *Walker*, 257 F.3d at 667 n.2; *Boivin v. Black*, 225 F.3d 36, 41 n.4 (1st Cir. 2000).

CONCLUSION

This Court should affirm the judgment of the court of appeals.

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In the Supreme Court of the United States

CHARLES MURPHY,

Petitioner,

v.

ROBERT SMITH AND GREGORY FULK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

In the twenty years since the enactment of the Prison Litigation Reform Act, four of the five courts of appeals that have considered the issue, along with the vast majority of district courts, have held that 42 U.S.C. § 1997e(d)(2) gives district courts discretion to apportion less than 25 percent of the judgment to attorney's fees. The statute provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." The lower courts have interpreted the statute to mean just what it says—that the portion of the judgment may not be larger than 25 percent, but it may be smaller.

Respondents defend the Seventh Circuit's idiosyncratic non-discretionary view of the statute, but they have understandably abandoned the Seventh Circuit's reasoning. *Cf. Johnson v. Daley*, 339 F.3d 582, 584-85 (7th Cir. 2003) (en banc). Respondents' new arguments, however, are no better than the one they have abandoned.

First, respondents misapprehend the statutory text, by reading language into the statute that is simply not there. Resp. Br. 7-16. The statute does not say that the attorney's fees must be satisfied first from the judgment, until the amount of fees reaches 25 percent of the judgment. Nor does the statute say that defendants are liable only for fees in excess of 25 percent of the judgment. All the statute says is that the portion of the judgment applied to attorney's fees may not exceed 25 percent. There are other statutes in which Congress has required that one source of funds be exhausted before turning to a second source, but this statute is not one of them.

Second, respondents misunderstand the surrounding context. Resp. Br. 16-20. Discretion in the apportionment of attorney's fees is consistent with the rest of section 1997e(d) and with Congress's other fee-shifting statutes, which likewise vest considerable discretion in the district courts. Because the backdrop to the statute is the fee-shifting rule of 42 U.S.C. § 1988, not the common law American Rule, there is no occasion to apply any presumption against fee-shifting. If a presumption is to be applied, it is section 1988's presumption in favor of fee-shifting.

Third, respondents draw the wrong conclusion from the statute's legislative history. Resp. Br. 21-23. Some of the statute's precursor bills included a sentence that would have made defendants liable for attorney's fees only to the extent the fees exceed 25 percent of the judgment. But this section was omitted from the final legislation. If any inference is to be drawn from this legislative history, it is that respondents' preferred rule was *not* adopted by Congress.

Finally, respondents misconceive the purpose of the PLRA. Resp. Br. 23-30. Congress's goal was not to make all litigation more burdensome for prisoners, but rather "to filter out the bad claims and facilitate consideration of the good." *Jones v. Bock*, 549 U.S. 199, 204 (2007). The district courts have been advancing this goal by apportioning less than 25 percent of the judgment to fees in the most egregious cases of misconduct by prison guards. In such cases, prisoners are encouraged to retain counsel and to file suit because they can obtain counsel at lower cost and they receive larger net recoveries. Defendants

are deterred more in egregious cases because they have to pay more.

In short, the conventional view of the statute is the correct one. The statute's text, context, legislative history, and purpose all point to the same conclusion—that district courts have discretion to apportion less than 25 percent of the judgment to attorney's fees.

ARGUMENT

A. The text of the statute explicitly gives the district court discretion to apply any portion of the judgment up to 25 percent.

1. The text of the statute provides that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." 42 U.S.C. § 1997e(d)(2). "25 percent" is plainly an upper limit. The statute directs the district court to decide on a sum less than or equal to 25 percent of the judgment, and then to apply that sum toward satisfying the amount of attorney's fees. Respondents err (Resp. Br. 7-16) in suggesting otherwise.

The statute does not say that fees must come from the judgment first and that defendants are responsible for fees only if 25 percent of the judgment is inadequate. Nor does the statute say that district courts must apportion exactly 25 percent of the judgment where fees exceed that amount. Congress could easily have enacted such a provision, but it did not. When Congress wishes to specify that one source of funds must be exhausted

before turning to a second source, Congress says so explicitly. *See, e.g.*, 15 U.S.C. § 78u-6(g)(3)(B) (requiring the SEC to pay into a fund only if other sources are insufficient); 12 U.S.C. § 1821a(c)(1) (requiring the Secretary of the Treasury to pay into a fund only if other sources are insufficient).

Respondents are mistaken in suggesting (Resp. Br. 10) that Congress did the same here. Section 1997e(d)(2) consists of two sentences. The first sentence of the statute says that "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." 42 U.S.C. § 1997e(d)(2). The second sentence caps the overall fee award at 150 percent of the judgment.[1] It provides: "If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant." *Id.* Respondents err in claiming (Resp. Br. 10) that the second sentence "identifies an auxiliary source, specifying that if 25 percent of the judgment is not enough to satisfy the award 'the excess shall be paid by the defendant,' so long as the overall fee award is not greater than 150 percent of the judgment." The second sentence specifies nothing of the kind. It merely requires the defendant to pay the "excess"—that is, the fees left over after the portion payable from the judgment has

[1] The lower courts have uniformly interpreted the second sentence to cap fees at 150 percent of the judgment. *See, e.g., Boivin v. Black*, 225 F.3d 36, 40 (1st Cir. 2000) ("While section 1997e(d)(2) is awkwardly phrased, its import and its essence are transparently clear: '[w]henever a monetary judgment is awarded' in an action covered by the PLRA and the prevailing party seeks attorneys' fees, the defendant shall pay such fees up to a maximum of 150% of the judgment amount, and no more.").

been deducted—up to a maximum of 150 percent of the judgment. The word "excess" in the second sentence refers to the excess over the "portion of the judgment" applied to fees. It does not refer to the excess over 25 percent of the judgment.

Respondents further misdescribe the statute when they allege (Resp. Br. 14) that "[t]he first sentence establishes when the defendant's liability for fees *begins*: when 25 percent is inadequate to satisfy the fee award." The first sentence does not say anything remotely resembling that. It merely says that the portion of the judgment applied to attorney's fees may not exceed 25 percent.

Respondents' misguided analogy to insurance deductibles (Resp. Br. 12) is based on their erroneous view of the statutory text. Insurance policies explicitly provide that coverage begins only when the entire amount of the deductible has been exhausted. But section 1997e(d)(2) includes no comparable provision. It does not say that defendants are liable for attorney's fees only when fees exceed 25 percent of the judgment. Rather, it says that the portion of the judgment applied to attorney's fees may not exceed 25 percent.

A hypothetical may help clarify this point. If a statute said "five dollars shall be applied to satisfy the amount of attorney's fees," and someone asked "how much shall be applied?", the answer would be obvious: five dollars. The same is true here, with the statutory phrase "a portion of the judgment (not to exceed 25 percent)" substituted for "five dollars." The statute says "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees." How much shall be

applied? The answer is obvious: a portion of the judgment (not to exceed 25 percent).

Respondents err once more in suggesting (Resp. Br. 14) that Congress's use of the word "shall" bars district courts from apportioning nominal amounts of the judgment to attorney's fees. Congress often uses the word "shall" to confer discretion on district courts to choose within a range between a maximum at the top and a nominal amount at the bottom. For example, criminal statutes routinely direct that a defendant "shall be fined not more than" a certain amount. *See, e.g.*, 18 U.S.C. § 1168(a) (employee of Indian gaming establishment "shall be fined not more than $250,000" for theft from the establishment); *id.* § 1958(a) (defendant "shall be fined not more than $250,000" for use of interstate commerce to commit murder for hire); *id.* § 2332h(c)(1) (person producing radiological dispersal device "shall be fined not more than $2,000,000"). All such statutes, like the one in our case, require the district court to transfer money, but permit the amount transferred to be nominal. It is not unusual for courts to impose nominal fines. *See, e.g.*, *Woodruff v. Thornsbury*, 2014 WL 5320611, *2 (S.D.W.V. 2014) (noting that certain first-time offenders are typically sentenced to pay nominal fines); *United States v. Matos*, 611 F.3d 31, 40 (1st Cir. 2010); *United States v. Heckman*, 592 F.3d 400, 403 (3d Cir. 2010).

In misreading the statute's text, respondents go astray at the very beginning of their argument, where they erroneously assert (Resp. Br. 1) that the goal of the statute was "to put prisoners in roughly the same position as members of the general public," whose lawyers receive a contingent fee rather than

statutory fees under 42 U.S.C. § 1988. The statute manifestly does not establish a contingent fee regime for prisoner suits. That could easily have been accomplished, simply by making prisoners ineligible for fees under section 1988. The statute merely says that a portion of the judgment, not to exceed 25 percent, shall be applied to the fees. But even if establishing a contingent fee regime were the goal of the statute, that goal could not supersede the statute's text. Congress enacts words, not goals. The Court "will not presume ... that any result consistent with ... the statute's overarching goal must be the law but will presume more modestly instead that the legislature says what it means and means what it says." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (citation, ellipses, and internal quotation marks omitted).

2. Lacking any textual justification for their theory, respondents argue (Resp. Br. 8) that the "satisfaction" of a fee award "means complete payment of that award." But the statute itself states that the prisoner need not make complete payment of the fee award. The prisoner need only pay "a portion of the judgment (not to exceed 25 percent)." 42 U.S.C. § 1997e(d)(2). In the typical prisoner case, even the maximum 25 percent would be nowhere close to complete payment of the fee award, because the median judgment in prisoner cases is only a bit more than $4,000. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 168 (2015). Respondents may be correct that the word "satisfaction," standing alone, often means "complete payment," but that has no relevance to the statute, because the statute's

text makes clear that complete payment of the fee award will normally not come from the judgment.

The phrase "applied to satisfy," as it appears in the statute, must therefore mean "applied toward satisfying," not "applied in complete payment of." This is a conventional use of the phrase, both in ordinary speech and in federal statutes. In ordinary speech, the credits from a math class, for example, may be "applied to satisfy" the requirements of a chemistry major. An example from a statute: Navy personnel get extra pay when they serve on submarines for 48 hours in a month. Hours in excess of 48 in a given month may be "applied to satisfy" the 48-hour requirement in subsequent months. 37 U.S.C. § 301c(a)(5)(A)(i)(I).

Section 1997e(d)(2) thus directs the district court to apply part of the judgment toward satisfying the attorney's fees. The statute expressly designates the amount that must be applied toward satisfying the attorney's fees—"a portion of the judgment (not to exceed 25 percent)." The district court complies with this directive so long as the portion of the judgment applied to attorney's fees does not exceed 25 percent. Contrary to respondents' contention (Resp. Br. 11), this common-sense understanding of "applied to satisfy" does not render any part of the statutory text superfluous.

Respondents' strained interpretation of the word "satisfy" has never been accepted by any court, because it cannot overcome the plain meaning of the statute. The statute does not say that the fees must be satisfied from the judgment, subject to a 25 percent cap. The statute just says that the portion of

the judgment applied to satisfy the fees cannot exceed 25 percent.

B. Respondents misunderstand the statute's context, which confirms that district courts have this discretion.

1. Respondents suggest (Resp. Br. 16-17) that the statute must be read to deny discretion to district courts because other parts of section 1997e(d) deny discretion to district courts. This suggestion misunderstands the provisions of section 1997e(d) to which respondents refer, all of which confer considerable discretion. Section 1997e(d) limits the *amount* of attorney's fees in prisoner cases, *Woodford v. Ngo*, 548 U.S. 81, 84 (2006), but it preserves most of the district court's traditional discretion to determine that amount.

For example, attorney's fees must be "directly and reasonably incurred." 42 U.S.C. § 1997e(d)(1)(A). The amount of the fee must be "proportionately related" to the relief ordered. *Id.* § 1997e(d)(1)(B)(i). Fees incurred while enforcing an order must be "directly and reasonably incurred." *Id.* § 1997e(d)(1)(B)(ii). "Reasonably" and "proportionately" are classic discretion-conferring terms. *See, e.g., Perdue v. Kenny A.*, 559 U.S. 542, 558 (2010) ("Determining a 'reasonable attorney's fee' is a matter that is committed to the sound discretion of a trial judge."). Even the caps on the amount of the fee, 42 U.S.C. § 1997e(d)(2), and the hourly rate, *id.* § 1997e(d)(3), preserve the district court's discretion under section 1988 to determine a fee that is "reasonable." Given this context, it makes perfect sense that Congress would likewise authorize district courts to exercise

discretion in apportioning the fee between the plaintiff and the defendant.

In authorizing district courts to exercise discretion over attorney's fees, section 1997e(d) is typical of Congress's fee-shifting statutes, because setting attorney's fees is an inherently discretionary task. "[T]he district court has discretion in determining the amount of a fee award," the Court has explained, "in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckherhart*, 461 U.S. 424, 437 (1983). Discretion is the norm when it comes to fee-shifting statutes. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 254 (2010) ("Statutes vesting judges with such broad discretion are well known in the law, particularly in the attorney's fees context."). The statute at issue in our case is a good example.

Respondents repeatedly complain (Resp. Br. 6, 11, 14) that the statute does not channel the district court's discretion. But that is Congress's normal practice in fee-shifting statutes, which typically vest considerable discretion in district courts, cabined only by very broad requirements of reasonableness or numerical caps. It is hard to imagine how Congress's practice could be otherwise, in light of the wide variety of circumstances that arise in litigation. The cases in which fees are awarded are often "complex, involving multiple claims for relief that implicate a mix of legal theories and have different merits. ... In short, litigation is messy, and courts must deal with this untidiness in awarding fees." *Fox v. Vice*, 563 U.S. 826, 833-34 (2011).

2. Respondents misapprehend the statute's context in a second way as well. They argue (Resp. Br. 18-20) that there is a presumption against fee-shifting which the statute fails to overcome. Respondents are triply mistaken.

First, the only "presumption against fee-shifting" is the ordinary presumption that the common law applies unless a statute has modified the common law. *Baker Botts L.L.P. v. Asarco LLC*, 135 S. Ct. 2158, 2164 (2015). There is no clear-statement rule for fee-shifting statutes. At common law, under the American Rule, each party bore its own fees, but Congress has enacted several statutes modifying the American Rule in particular kinds of cases. These fee-shifting statutes are interpreted straightforwardly, without any thumb on the scale. *See, e.g.*, *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755-58 (2014).

Second, our case falls within one of the categories of cases for which Congress clearly *has* modified the American Rule. When plaintiffs prevail under 42 U.S.C. § 1983, they are entitled to attorney's fees under 42 U.S.C. § 1988. Section 1988 dispels any presumption against fee-shifting.

Third, the statute at issue in our case is an exception to section 1988, not an exception to the American Rule. The general rule established by section 1988 is that prevailing plaintiffs in section 1983 cases are entitled to a reasonable attorney's fee. The statute in our case limits that general rule in certain respects when the plaintiff is a prisoner. Where Congress legislates against the background of the American Rule, the American Rule applies unless Congress says otherwise. *Fogerty v. Fantasy, Inc.*,

510 U.S. 517, 533-34 (1994). By the same token, where Congress legislates against the background of section 1988, section 1988 applies unless Congress says otherwise. If any presumption is to be applied, therefore, it would be a presumption *in favor of* fee-shifting, not a presumption against it.

C. The legislative history shows that Congress rejected respondents' view of the statute.

Respondents note (Resp. Br. 21) that some of the statute's precursor bills included a sentence that provided: "If the award of attorney's fees is greater than 25 percent of the judgment, the excess shall be paid by the defendant." *See* H.R. 2076, 104th Cong., § 803(d) (1995); S. 1275, 104th Cong., § 3 (1995); S. 1279, 104th Cong., § 3 (1995) (all reproduced in *A Legislative History of the Prison Litigation Reform Act of 1996* (Bernard D. Reams, Jr. & William H. Manz eds., 1997), docs. 42, 44, and 45). Congress omitted this sentence from the final legislation. The legislative history includes no discussion of why.

Normally, of course, when a provision is omitted from legislation, the inference is that the provision is *not* part of the legislation. *See, e.g., Russello v. United States*, 464 U.S. 16, 23-24 (1983). Here, that normal inference would confirm that respondents' view of the statute is incorrect. Respondents argue that the defendant is responsible for attorney's fees only to the extent the fees exceed 25 percent of the judgment. While these bills were working their way through Congress, however, Congress rejected such a rule.

Respondents draw an inference that is the mirror image of the normal one. They argue (Resp. Br. 22-23) that Congress deleted the sentence in order to enshrine it into law. This paradoxical claim is, unsurprisingly, not supported by any evidence. Respondents cite general statements by two Senators discussing their support for the PLRA, but these statements are completely unrelated to the apportionment of attorney's fees.

Respondents speculate (Resp. Br. 22-23) that perhaps Congress deleted the second sentence on the ground that it was redundant, because the rule expressed in the second sentence had already been stated in the first. But this is an unlikely explanation, because the first sentence merely provided that the portion of the judgment applied to attorney's fees could not exceed 25 percent. A much likelier explanation is that by choosing to keep the first sentence but to jettison the second, Congress chose to keep a 25 percent ceiling for the plaintiff's contribution to fees, but to reject a 25 percent floor for the defendant's contribution.

If any inference is to be drawn from the legislative history, therefore, it is the conventional one. By omitting language that would have made defendants liable for attorney's fees only to the extent the fees exceed 25 percent of the judgment, Congress intended *not* to enact such a rule. Rather, Congress intended to enact the rule it actually enacted, under which the district court has discretion to apportion less than 25 percent of the judgment to attorney's fees.

D. Respondents misconceive the purpose of the PLRA, which is best served by discretion regarding the apportionment of fees.

Respondents are under the misimpression (Resp. Br. 23-30) that the purpose of the PLRA was to make *all* litigation more burdensome for prisoners. Such a goal would no doubt have been advanced by forcing prisoners to pay the maximum amount of attorney's fees in every case. But respondents misconceive the PLRA's purpose.

The purpose of the PLRA was "to reduce the quantity and improve the quality of prisoner suits." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The goal was to empower district courts to shed the frivolous cases so they could spend more time ensuring that prisoners obtained appropriate relief in meritorious cases. "To that end, Congress enacted a variety of reforms designed to filter out the bad claims and facilitate consideration of the good." *Jones v. Bock*, 549 U.S. 199, 204 (2007). Section 1997e(d)(2) was one of these reforms. It comes into play only in meritorious cases, after the prisoner has already prevailed at trial. It is a statute that helps district courts facilitate consideration of the good claims.

Ever since section 1997e(d)(2) was enacted, the vast majority of district courts—even in the Seventh Circuit, until this case—have been exercising their discretion under the statute to ensure that prisoners pay a smaller share of the attorney's fees in the most egregious cases. Pet. Br. 22-23 (citing cases). Respondents doubt (Resp. Br. 25-26) that adjusting the apportionment of attorney's fees could affect any-

one's incentives, but the district judges who preside over these cases surely know better.

First, under the conventional view of the statute, prisoners obtain counsel at lower cost and receive larger net recoveries in the most egregious cases. This result encourages prisoners to retain counsel and to file suit in precisely the cases the PLRA was intended to facilitate. *See, e.g.*, *Hernandez v. Goord*, 2014 WL 4058662, *13 (S.D.N.Y. 2014) (apportioning 5 percent of the judgment toward attorney's fees so as not to "deter prisoners from bringing meritorious claims in the future").

Second, under the conventional view of the statute, because lawyers are less expensive for prisoners to retain in egregious cases, more lawyers represent prisoners in such cases. Prisoners with meritorious claims need lawyers, because it extraordinarily difficult for an incarcerated prisoner to litigate on his own. But the vast majority of prisoners have to proceed *pro se*. Representing prisoners is not a path to riches. It is often very hard for prisoners to find counsel, even in meritorious cases. Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1609-13 (2003). By exercising their discretion so as to increase the number of lawyers involved in these cases, the district courts have been facilitating the consideration of meritorious claims.

Third, under the conventional view of the statute, defendants pay a greater share of the attorney's fees in the most egregious cases. This result provides an extra measure of deterrence where deterrence is most needed. *See, e.g.*, *Dykes v. Mitchell*, 2009 WL 3242006, *2 (E.D. Mo. 2009) (apportioning 5 percent of the judgment toward attorney's fees because "the

degree of defendant Mitchell's culpability was high" and because "an award of attorney's fees against Mitchell could deter other persons acting under similar situations"). "It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which § 1983 was enacted." *Imbler v. Pachtman*, 424 U.S. 409, 442 (1976). Respondents protest (Resp. Br. 28) that punitive damages are available in cases of egregious misconduct. Indeed they are, but punitive damages have never been understood to be an exclusive deterrent preempting the use of all others.

Contrary to the view of amici Michigan et al. (Mich. Br. 15-20), district courts do not engage in impermissible "double-counting" when they consider the egregiousness of the constitutional violation in apportioning fees. In virtually all areas of law, the factors that determine whether a violation has occurred and that determine the severity of the violation are the same factors that determine the relief received by the plaintiff. On Michigan's theory, a court would be barred from considering the severity of *any* tort in setting the appropriate level of damages or fees, because the court had already considered the culpability of the defendant's conduct at the liability stage.

Ours is an egregious case. Respondents beat Charles Murphy so badly they knocked him unconscious and crushed his eye socket, causing permanent damage to his vision. They left him naked and bleeding on the floor of a cell, without any medical attention, although they knew full well that he

needed it. Pet. Br. 4. As amici ACLU et al. demonstrate, prison guards sometimes abuse their power in shocking ways. Discretion regarding the apportionment of attorney's fees best serves the purpose of the PLRA, by encouraging prisoners to retain counsel and file the lawsuits that are the only realistic means of deterring this kind of misconduct.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

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RECORD AND BRIEFS

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Supreme Court of the United States

CHARLES MURPHY,
Petitioner,
v.
ROBERT SMITH AND GREGORY FULK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES, HUMAN RIGHTS DEFENSE CENTER, THE LEGAL AID SOCIETY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL POLICE ACCOUNTABILITY PROJECT, RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER, SOUTHERN POVERTY LAW CENTER, UPTOWN PEOPLE'S LAW CENTER, AND WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS IN SUPPORT OF PETITIONER

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Alan J. Beck et al., U.S. Dep't of Justice, *Special Report: Sexual Victimization*

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INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, non-partisan organization with over 1.6 million members dedicated to the principles of liberty and equality enshrined in the Constitution. Throughout its 97-year history, the ACLU has been deeply involved in protecting the rights of prisoners and, in 1972, created the National Prison Project to further this work. The ACLU of Illinois is the state affiliate of the ACLU. Both the national and Illinois ACLU have appeared before state and federal appellate courts, including this Court, in a wide range of cases involving the rights of people in the criminal justice system. The question presented in this case is of significant concern to both the national ACLU and the ACLU of Illinois because it involves cases brought to vindicate the federal rights of prisoners and pretrial detainees.

The Human Rights Defense Center (HRDC) is a nonprofit charitable corporation that advocates on behalf of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing *Prison*

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

Legal News, a monthly publication that covers criminal justice-related news and litigation nationwide, publishing and distributing self-help reference books for prisoners, and engaging in litigation in state and federal courts on issues concerning detainees.

The Legal Aid Society is a private, nonprofit organization that has provided free legal assistance to indigent persons for over 125 years and is the largest provider of criminal defense services in New York City. Its Prisoners' Rights Project (PRP), established in 1971, seeks to ensure the protection of prisoners' constitutional and statutory rights through litigation and advocacy on behalf of people incarcerated in New York State prisons and the New York City jails. PRP has represented numerous prisoners in civil lawsuits and has been involved in litigation concerning the interpretation of the Prison Litigation Reform Act virtually since the statute's enactment, both as counsel and as amicus curiae.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and

private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the United States Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The National Police Accountability Project (NPAP) is a nonprofit organization founded by members of the National Lawyers Guild. Members of NPAP represent plaintiffs in police misconduct and prison condition cases, and NPAP often presents the views of victims of civil rights violations through amicus filings in cases raising issues that transcend the interests of the parties before the Court. NPAP has more than five hundred attorney members throughout the United States.

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC has offices at the Northwestern Pritzker School of Law, at the University of Mississippi School of Law, in New Orleans, in St. Louis, and in Washington, D.C. RSMJC attorneys have led civil rights battles in areas that include police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, and the treatment of incarcerated men and women.

The Southern Poverty Law Center (SPLC) is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Since its founding in 1971, the SPLC has won numerous landmark legal victories on behalf of the exploited, the powerless, and the forgotten. SPLC's lawsuits have toppled institutional racism in the South, bankrupted some of the nation's most violent white supremacist groups, and won justice for exploited workers, abused prison inmates, disabled children, and other victims of discrimination.

The Uptown People's Law Center (UPLC) is a not-for-profit legal clinic founded in 1975. In addition to providing legal representation, advocacy, and education for poor and working people in Chicago, the UPLC also provides legal assistance to people housed in Illinois prisons in cases related to their confinement. UPLC has provided direct representation to over 100 prisoners, and currently has nine class action or putative class action cases pending relating to the civil rights of people confined in Illinois prisons.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs (WLC) is a nonprofit civil rights organization established in 1968 to help eradicate discrimination and poverty by enforcing civil rights laws and constitutional provisions through litigation and other means. In furtherance of this mission, the Washington Lawyers' Committee has a dedicated DC Prisoners' Rights Project, established in 2006, which advocates for the

humane treatment and dignity of all persons convicted of or charged with a criminal offense under DC law, and represents prisoners in litigation across the country. WLC has extensive experience in advocating and litigating on behalf of clients under the Prison Litigation Reform Act and has a strong interest in ensuring that it is interpreted correctly by federal courts across the country, and in ensuring that possible litigation by and damage awards to prisoners will help deter prison guard misconduct, and accordingly joins this brief.

SUMMARY OF ARGUMENT

Congress enacted 42 U.S.C. § 1983 to provide compensation for violations of federal rights and to deter illegal conduct by government officials. *See Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978); *Carey v. Piphus*, 435 U.S. 247, 255 (1978). These functions of § 1983—deterrence and compensation—are nowhere more critical than in American prisons and jails.

Incarcerated men and women too often suffer horrific abuses that call out for recompense and deterrence. To cite a few examples from federal cases, prison staff have held prisoners down in boiling water until their skin peeled off, shocked prisoners with cattle prods, left prisoners catatonic and covered in urine in telephone-booth-sized cages, compressed prisoners in restraint chairs to the point of squeezing out their intestines, kneed pregnant female prisoners in the stomach, and allowed prisoners to rot to death from gangrene.

The lower court in this case imposed a rule that every damage award in a case "brought by a prisoner" under 42 U.S.C. § 1997e(d) must be reduced automatically by 25%. That blanket rule not only conflicts with the text and intent of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), as the petitioner's brief shows, but it also undermines arbitrarily the deterrent and compensatory purposes of § 1983.

In contrast, reading the phrase "not to exceed 25%" as only a ceiling rather than both a ceiling and a floor is consonant with both § 1997e(d) and the central function of § 1983. Judicial discretion to reduce damages by up to 25% comports with Congress' intent to require at least some reduction in damages to offset attorneys' fees in cases "brought by a prisoner" under § 1997e(d). That discretion also avoids unnecessary harm to the intended functions of § 1983. When the need for deterrence and recompense counsels a smaller reduction, district courts may diminish a damages award by less than one-quarter.

ARGUMENT

I. THE DETERRENT AND COMPENSATORY PURPOSES OF SECTION 1983 REQUIRE DAMAGES WHEN CORRECTIONAL OFFICERS COMMIT VIOLATIONS OF FEDERAL LAW.

Congress enacted 42 U.S.C. § 1983 to effectuate two principal goals—providing compensation to victims of abuse when state officials violate federal law and deterring government misconduct in the future. "The policies underlying § 1983 include

compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978). Indeed, "[t]he principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871." *Carey v. Piphus*, 435 U.S. 247, 255 (1978).

Section 1983 serves this deterrent and compensatory function principally by creating a damages remedy for the victim when state actors violate federal rights. "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). This Court has observed that it is "almost axiomatic" that damages serve as a deterrent to unconstitutional acts by government employees and policymakers. *Carlson v. Green*, 446 U.S. 14, 21 (1980).

The deterrent power of damages "was precisely the proposition upon which § 1983 was enacted." *Imbler v. Pachtman*, 424 U.S. 409, 442 (1976); *see also City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring) (stating that § 1983 "is designed to provide compensation for injuries arising from the violation of legal duties, and thereby, of course, to deter future violations" (citation omitted)).

The deterrent effect of monetary penalties works on two different levels: individual officers named in suits for damages are discouraged from engaging in

future misconduct, while local governments (and state governments, when they have adopted policies of indemnifying their employees for damages) are encouraged to make policy changes necessary to prevent constitutional violations. The threat of damages can affect the behavior of individual officers by "creat[ing] an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S at 651–52.

Monetary penalties can also "encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." *Id.* at 652. Damages imposed directly or indirectly are "particularly beneficial in preventing those systemic injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials." *Id.* (internal quotation marks omitted).

When Congress enacted 42 U.S.C. § 1997e(d)(2), it evinced no intent to undermine the purposes it sought to serve in 42 U.S.C. § 1983. It did provide that when a prisoner obtains a monetary judgment, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant." But reading that language, as the court below did here, to mandate a 25 percent reduction in all cases effectively reduces all judgments to incarcerated persons by one-quarter, regardless of the culpability of the actor or the extent of injuries suffered by the prisoner. That reading,

contrary to the literal terms of the text, also undermines Congress' intent in providing for—and preserving—an avenue for prisoners to seek judicial redress in damages for constitutional injuries inflicted upon them. Reading the statute as it is written, to afford district courts discretion to reduce the damages award by an amount "not to exceed 25 percent" preserves judicial flexibility to tailor remedies to the constitutional wrongs they have identified. And as we show in the following section, there is every reason to afford courts that flexibility to permit both Sections 1983 and 1997e to serve their purposes.

II. TO EFFECTUATE THE DETERRENT AND COMPENSATORY PURPOSES OF SECTION 1983, DISTRICT COURTS MUST HAVE DISCRETION TO REDUCE DAMAGES AWARDS BY LESS THAN 25% IN THE FACE OF EGREGIOUS VIOLATIONS OF FEDERAL LAW.

Abuse by staff in American prisons and jails calls out for the deterrent and compensatory functions of damages envisioned by the legislators who enacted § 1983. Such abuse is commonplace, and often horrifying. A blanket rule requiring district courts to reduce damages awards by 25% in every case brought by a prisoner would weaken the function of damages, both as a measure of recompense when prisoners suffer needlessly and as a check against future misconduct.

Correctional staff frequently assault incarcerated men and women. A study funded by the Office of Justice Programs and the National Institute of

Mental Health found that 6,964 general population male prisoners surveyed reported 1,466 incidents of staff-on-prisoner physical assault over a six-month period—meaning that approximately one of every five prisoners reported suffering such abuse. Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 CORRECTIONAL HEALTH CARE 58, 62, 64, 76 (2009). While some prisoners may have exaggerated their claims, and others may have denied abuse out of fear of retaliation, this statistic does suggest that assault remains an ever-present danger to the 2.2 million persons imprisoned in the United States.

Statistics on reported sexual violence committed by staff are similarly grim. The Bureau of Justice Statistics found "an estimated 1.2% of former [state] prisoners reported that they unwillingly had sex or sexual contact with facility staff." Alan J. Beck & Candace Johnson, U.S. Dep't of Justice, *Sexual Victimization Reported by Former State Prisoners, 2008*, at 8 (2011). Extrapolated to 2.2 million incarcerated prisoners, that amounts to more than 26,000 incidents of reported staff sexual abuse of prisoners.

The number of sexual abuse incidents in state prisons substantiated by internal investigation is lower, but also quite significant. The Bureau of Justice Statistics found that "[s]tate prison administrators reported 537 substantiated incidents of sexual victimization in 2011 . . . . About 52% of substantiated incidents of sexual victimization in

2011 involved only inmates, while 48% of substantiated incidents involved staff with inmates." Alan J. Beck et al., U.S. Dep't of Justice, *Special Report: Sexual Victimization Reported by Adult Correctional Authorities, 2009–2011*, at 1 (2014).

The famous Stanford Prison Experiment randomly assigned some participants to be guards and others to be prisoners in a laboratory "prison." All of the participants were college students. The results were chilling and may help to explain why prisoners face such frequent and wide-ranging abuses:

> The most hostile guards on each shift moved spontaneously into the leadership roles of giving orders and deciding on punishments. They became role models whose behavior was emulated by other members of the shift. Despite minimal contact between the three separate guard shifts and nearly 16 hours a day spent away from the prison, the absolute level of aggression as well as more subtle and "creative" forms of aggression manifested, increased in a spiraling fashion. Not to be tough and arrogant was to be seen as a sign of weakness by the guards and even those "good" guards who did not get as drawn into the power syndrome as the others respected the implicit norm of *never* contradicting or even interfering with an action of a more hostile guard on their shift.

Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIM. & PENOLOGY 69, 94 (1973). Thus, there are factors inherent in the coercive

setting of prisons that encourage the abuse of prisoners, and call for countervailing incentives in the legal system.

The following cases exemplify some of the horrors that occur in American prisons and jails. When a victim experiences abuses like these, a district court should not be required to reduce a damages award by a full 25%, because doing so would undermine the deterrent and compensatory functions of § 1983.

A. *T.R. v. South Carolina Department of Corrections*

In *T.R. v. South Carolina Department of Corrections*, a state court described two chilling uses of restraint chairs at a South Carolina prison:

> Inmate Jerod Cook cut himself on his arm. Approximately 90 minutes after being discovered, he was placed in a restraint chair where he remained for four hours. The videotape shows a pool of blood on the floor of Mr. Cook's cell. He is hardly able to stand before being placed in the restraint chair. He continues to bleed while in the restraint chair and pleads with correctional officers for medical help. As Dr. Patterson testified, the decision by security staff—rather than by medical staff—to keep Mr. Cook in a restraint chair for four hours under those conditions was an "outrageous, horrific response."
>
> Inmate Baxter Vinson underwent a similar experience . . . [after] cutting himself in the abdomen while in his cell. Approximately three

> hours and twenty minutes after his wound was discovered, security staff placed him in a restraint chair where he remained for approximately two hours before being transported to a hospital. The videotape shows that while in the restraint chair, Mr. Vinson is eviscerating, with his intestine coming out of the abdominal wall. The tape shows correctional officers tightening the restraints, thereby putting additional pressure on his abdomen.

Order Granting Judgment in Favor of Plaintiffs, *T.R. v. South Carolina Dep't of Corrs.*, No. 2005-CP-40-2925, at 19 (S.C. Ct. of Com. Pl. filed Jan. 8, 2014), https://www.clearinghouse.net/chDocs/public/PC-SC-0006-0006.pdf.

B. *Borum v. Swisher County*

The plaintiff in *Borum v. Swisher County* had once tried to commit suicide with a shotgun, which "destroyed significant portions of [his] face." No. 2:14-CV-127-J, 2015 WL 327508, at *1 (N.D. Tex. Jan. 26, 2015). As a result, Borum "could not speak clearly, had difficulty breathing, and was blind in one eye. He also could not eat solid food and instead required a liquid diet, which was administered through a feeding tube sewn inside his stomach." *Id.* During his three days in the Swisher County Jail, Borum "received no medical care of any kind, despite the fact that he began hallucinating, behaved erratically, and was likely suffering from delirium tremens . . . a severe form of alcohol withdrawal that causes tremors and other changes to the nervous system." *Id.* at *2. Jail

officers refused to provide Borum the liquid diet he needed and fed him only "a mixture of honey and orange juice, which was the County's standard method of 'treating' inmates experiencing alcohol withdrawal symptoms." *Id.* As Borum continued to deteriorate, "jail officials placed him in a detox cell, where he spent the night screaming incoherently, talking to invisible friends, and trying to pull an imaginary person out of the toilet." *Id.* And yet no one called a hospital, a doctor, or 911 until much later, when Borum collapsed, hit his head, and fell unconscious. *Id.* He died in the hospital. *Id.*

C. *In re Death of Bradley Ballard*

In December 2014, the New York State Commission of Correction issued a final report on the death of Bradley Ballard, a 39-year-old man who died while incarcerated in the New York Department of Corrections. The Commission of Correction found that Ballard "was keeplocked in his cell for six days prior to his death and was denied access to his life-supporting prescribed medications, denied access to medical and psychiatric care, denied access to essential mandated services such as showers and exercise periods, and denied running water for his cell."[2] Ultimately, Ballard "was discovered in the evening on 9/10/13, to be lying in his cell naked,

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[2] New York State Commission of Correction, *In re Death of Bradley Ballard, an inmate of the Anna M. Kross Center, Final Report of the New York State Commission of Correction*, at 2 (Dec. 2014).

unresponsive, covered with urine and feces, and in critical condition." *Id.*

The Commission of Correction concluded:

> Ballard suffered from diabetes mellitus which required periodic insulin coverage. Ballard went into cardiac arrest shortly after being removed from his cell and was pronounced dead at Elmhurst Hospital. Ballard died from diabetic ketoacidosis . . . due to withholding of his diabetes medications complicated by sepsis due to severe tissue necrosis of his genitals as a result of a self-mutilation . . . . Had Ballard received adequate and appropriate medical and mental health care and supervision and intervention when he became critically ill, his death would have been prevented.

D. *Payne v. Parnell*

In *Payne v. Parnell*, a Texas correctional officer (Parnell) used a cattle prod to shock an unwitting prisoner (Payne) in the back. 246 F. App'x 884, 885 (5th Cir. 2007). This caused Payne to "'jump[ ] and holler[ ],' and left a mark on Payne's back." *Id.* (alterations in original). Parnell then "chased Payne around a nearby office building in an attempt to shock him again. Payne sought refuge in a bathroom, at which point Parnell attempted to shock him through the door of the bathroom by using the door handle to transmit the electricity from the cattle prod." *Id.*

E. *Nunez v. City of New York*

In *Nunez v. City of New York*, No. 1:11-cv-05845 (S.D.N.Y. filed Dec. 7, 2015), the U.S. Department of

Justice issued a findings letter regarding the jails on Rikers Island. The findings letter documented a litany of abuses, including the following episodes:

> In December 2012, after being forcibly extracted from their cells for failure to comply with search procedures, two inmates (mentally ill inmates placed in the punitive segregation unit . . .) were taken to the [medical] clinic and beaten in front of medical staff. The New York City Department of Investigation . . . conducted an investigation and concluded that staff had assaulted both inmates "to punish and/or retaliate against the inmates for throwing urine on them and for their overall refusal to comply with earlier search procedures."
>
> Based on inmate statements and clinic staff accounts, a Captain and multiple officers took turns punching the inmates in the face and body while they were restrained. One clinician reported that she observed one inmate being punched in the head while handcuffed to a gurney for what she believed to be five minutes. Another clinician reported that she observed DOC staff striking the other inmate with closed fists while he screamed for them to stop hurting him. A physician reported that when he asked what was happening, correction officers falsely told him that the inmates were banging their heads against the wall. A Captain later approached a senior [mental health department] official and stated, in substance, that it was good the clinical staff were present

> "so that they could witness and corroborate the inmates banging their own heads into the wall." The correction officers' reports did not refer to any use of force in the clinic, and each report concluded by stating: "The inmate was escorted to the clinic without further incident or force used." The involved Captain did not submit any use of force report at all . . . . One of the inmates told our consultant that he was still spitting up blood due to the incident when interviewed more than a month later.[3]

F. *Castro v. County of Los Angeles*

In *Castro v. County of Los Angeles*, Mr. Castro, a detainee at a West Hollywood police station, spent a full minute banging on his cell door after a drunk and combative inmate, Gonzelez, was placed in the cell with him. 833 F.3d 1060, 1065 (9th Cir. 2016) (en banc). Jail video showed the supervising officer, Solomon, sitting unresponsive at a nearby desk the entire time. *Id.* at 1073. Twenty minutes later, an "unpaid community volunteer" walked by the cell and saw Gonzalez inappropriately touching Castro's thigh. *Id.* at 1065. The volunteer reported this to Solomon, but Solomon waited six minutes to respond. *Id.* By that point, Gonzalez was "stomping on Castro's head," and Castro was "lying unconscious in a pool of

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[3] Letter from Jocelyn Samuels, Acting Assistant Attorney General, U.S. Dep't of Justice Civil Rights Div., to Hon. Bill de Blasio, Mayor (August 4, 2014), at 14, https://www.justice.gov/sites/default/files/usao sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf.

blood." *Id.* Castro spent a month in a hospital and four years in a long-term care facility; he suffered permanent cognitive impairments. *Id.*

G. *Ross v. Blake*

In *Ross v. Blake*, 136 S. Ct. 1850, 1855 (2016), the plaintiff, Shaidon Blake, was an inmate in a Maryland prison when he was assaulted by two guards while being moved from his cell. One of the guards shoved the handcuffed Blake at the top of a flight of stairs, and then shoved him again at the bottom. *Id.* When Blake protested, one guard held "Blake against the wall, [while the other guard] wrapped a key ring around his fingers and then punched Blake at least four times in the face in quick succession. [The guard] paused briefly, then punched Blake in the face again." *Blake v. Ross*, 787 F.3d 693, 695 (4th Cir.), *cert. granted*, 136 S. Ct. 614 (2015), *and vacated*, 136 S. Ct. 1850 (2016). The two guards "then took Blake to the ground by lifting him up and dropping him. [One guard] dropped his knee onto Blake's chest, and he and [the other guard] restrained Blake until other officers arrived." *Id.* Blake suffered nerve damage as a result. *Id.* A jury awarded him $50,000 against one of the guards on these facts.[4]

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[4] *Ross*, 136 S.Ct. at 1855. The claim against the other defendant had been dismissed for failure to exhaust administrative remedies, a decision vacated and remanded by this Court. *Id.* at 1855, 1862.

H. *Madrid v. Gomez*

In *Madrid v. Gomez*, the Northern District of California cataloged a staggering number of abuses at California's Pelican Bay State Prison. 889 F. Supp. 1146, 1162–67 (N.D. Cal. 1995). For instance, a nurse at Pelican Bay observed five to six correctional officers holding a handcuffed African American prisoner in a bathtub filled with boiling water. 889 F. Supp. 1146, 1167 (N.D. Cal. 1995). One of the officers holding the prisoner said, "looks like we're going to have a white boy before this is through . . . his skin is so dirty and so rotten, it's all fallen off." *Id.* at 1167. The nurse observed that "from just below the buttocks down, [the prisoner's] skin had peeled off and was hanging in large clumps around his legs, which had turned white with some redness." *Id.* Even so, the officers did not summon medical help; instead, one of them declared that the prisoner "had been living in his own feces and urine for three months, and if he was going to get infected, he would have been already." *Id.*

In a separate incident at Pelican Bay, guards injured a non-threatening prisoner by firing "two rounds from a 38 millimeter gas gun" into the prisoner's cell; shooting the prisoner in the chest and stomach with a taser gun; and striking the prisoner "on the top of his head with the butt of the gas gun, knocking him unconscious." *Id.* at 1162. When the prisoner "regained consciousness, he was on the floor with his face down. An officer was stepping on his hands and hitting him on his calves with a baton, at which point [the prisoner] passed out a second time." *Id.* The prisoner was then "dragged out of the cell face

down; his head was bleeding, and a piece of his scalp had been detached or peeled back." *Id.* The incident report falsely stated that the prisoner "sustained his head injury when he fell and accidentally hit his head on the toilet . . . ." *Id.*

In yet another Pelican Bay incident, correctional officers dragged a handcuffed prisoner from his cell, threw him against the wall, and, having knocked the prisoner unconscious, kicked him in the "head, face, neck and shoulders . . . ." *Id.* at 1164. The inmate "lost four teeth, received a 1.5 inch laceration to the back of his head, and suffered abrasions to the head, face, back, neck, chest and both legs." *Id.*

I. ***Clark-Murphy v. Foreback***

In *Clark-Murphy v. Foreback*, a Michigan prisoner collapsed in the cafeteria line while the prison was on heat alert. 439 F.3d 280, 283 (6th Cir. 2006). The prisoner was taken to an "observation cell," a type of cell that "gives officers an opportunity to observe a prisoner more closely than would be possible if the prisoner were in the general prison population." *Id.* The prisoner then had a series of psychotic episodes, including one in which he barked like a dog. *Id.* at 283–85. Prison staff repeatedly turned off the water to his cell over the course of several days, during which the prisoner asked for water and was observed drinking from the toilet. *Id.* He died of dehydration. *Id.* at 285.

J. ***Hadix v. Caruso***

In *Hadix v. Caruso*, T.S., "a psychotic man with apparent delusions" who was "screaming

incoherently[,]" was left by correctional officers "in chains on a concrete bed over an extended period of time with no effective access to medical or psychiatric care and with custody staff telling him that he would be kept in four-point restraints until he was cooperative." 461 F. Supp. 2d 574, 578 (W.D. Mich. 2006). T.S. was restrained in this manner for approximately four days, two of which were "designated 'heat alert' days with heat index readings around 100 degrees." *Id.* at 579.

The court noted that "for many hours of [his] restraint, T.S. was naked and [lay] in his own urine." *Id.* at 577. Staff finally removed T.S. from restraints after a period of "prolonged 'sleeping.'" *Id.* at 579. Later in the day, "he fell face first onto the concrete floor." *Id.* Minutes afterward, T.S. fell off the toilet and could not get up on his own, at which point a nurse checked both of T.S.'s arms and found only a "faint" pulse. *Id.* And yet, "neither custody staff (who checked on T.S. on regular intervals), nor psychological and nursing staff (who all saw T.S. in a state of decline) took any action to summon emergency care when the need to do so was obvious." *Id.* at 580. Staff summoned an ambulance only later, when the same nurse who had checked T.S.'s pulse returned and "found T.S. not breathing." *Id.* T.S. was taken to the hospital and pronounced dead. *Id.*

K. *United States v. Erie County*

Before the start of litigation in *United States v. Erie County*, No. 09-cv-0849 (W.D.N.Y. filed Sept. 30, 2009), the U.S. Department of Justice issued a findings letter stating:

> In August 2007, during the booking process, ECHC deputies struck a pregnant inmate in the face, threw her to the ground, and kneed her in the side of her stomach. When she informed deputies that she was pregnant, the deputies allegedly replied that they thought she was fat, not pregnant. The inmate lost her two front teeth as a result of the assault.[5]

L. ***Depriest v. Epps***

In *Depriest v. Epps*, the court concluded that conditions at Walnut Grove, a youth prison, "[f]ar exceeded mere breaches of the United States Constitution." *Depriest v. Epps*, No. 3:10-cv-00663-CWR-FKB, 2012 BL 443032, at *2 (S.D. Miss. Mar. 26, 2012). In one example, "staff of the [prison] and those responsible for overseeing and supervising the youth engaged in sexual relationships with the youth [and] exploited them by selling drugs in the facility . . . ." *Id.* Additionally, the detained youth were "frequently subjected to chemical restraints for the most insignificant of infractions and [were] denied necessary medical care. And although many of the offenders [had] been ordered to finish their education, 'the facility prevent[ed] most youth from accessing even the most basic education services.'" *Id.* at *2–3. The court found "'brazen' staff sexual misconduct and

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[5] Letter from Loretta King, Acting Assistant Attorney General, U.S. Dep't of Justice Civil Rights Div., to Hon. Chris Collins, Erie Cty. Exec. (July 15, 2009), at 18, https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/Erie findlet_redact 07-15-09.pdf.

brutal youth-on-youth rapes" and concluded that the prison "paints a picture of such horror as should be unrealized anywhere in the civilized world." *Id.* at *4–5.

M. *Jones v. Gusman*

In *Jones v. Gusman*, an officer performed a check of a jail hallway so inattentively that he did not notice a detainee being gang raped by ten to fourteen other detainees. 296 F.R.D. 416, 437 (E.D. La. 2013). The assailants ripped the victim's clothes off and hog tied him; stuck fingers, a tongue, a toothbrush, and toothpaste in the victim's anus; kicked him and struck him in the head with a mop and bucket; carried him to a different location; tied him to a post, punched him repeatedly, and beat him with a mop handle hard enough to strip the skin from his back and buttocks; threw hot water and possibly urine on him; and made him dance while wearing a thong. *Id.* at 437–38. After this attack, the prisoner did not receive medical care for nearly a year. *Id.* at 438.

In a second incident documented in the same decision, a deputy did not investigate when he "heard what he believed to be inmates fighting on a tier, as well as statements like 'stick your finger in his butt and piss on him.'" *Id.* at 432.

N. *Hope v. Pelzer*

On two occasions, Alabama correctional officers handcuffed prisoner Larry Hope to a hitching post. *Hope v. Pelzer*, 536 U.S. 730, 733-34 (2002). In the second instance, officers forced Hope to "take off his shirt, and he remained shirtless all day while the sun

burned his skin." *Id.* at 734–35. Hope was shackled to the hitching post for seven hours, during which "he was given water only once or twice and was given no bathroom breaks." *Id.* at 735. A guard, knowing Hope was thirsty, set out to taunt him: he "first gave water to some dogs, then brought the water cooler closer to [Hope], removed its lid, and kicked the cooler over, spilling the water onto the ground." *Id.* This Court concluded that "Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous." *Id.* at 745.

O. *Lippert v. Godinez*

In *Lippert v. Godinez*, a court-appointed medical expert documented numerous instances of horrifying medical treatment by the Illinois Department of Corrections and its healthcare contractor staff. Final Report of the Court Appointed Expert, Dkt. 339, *Lippert v. Godinez*, 10-4603 (N.D. Ill. May 19, 2015). At one prison, for example, a patient "presented with classic signs and symptoms of lung cancer from the time he arrived in IDOC, yet these were ignored by healthcare staff for three months. By the time he was finally diagnosed, the only treatment he was eligible for was palliative radiation, which he declined." *Id.* at 7. Nine days later, the patient died. *Id.* The report also found that another patient "had a history of cirrhosis and was admitted to the infirmary with recurrent active GI bleeding. Despite evidence of substantial blood loss, the patient was not sent to the hospital

until the following day; he died at the hospital two days later." *Id.* at 32.

P. ***United States v. Cook County***

Before the start of litigation in *United States v. Cook County*, No. 10-cv-02946 (N.D. Ill. filed May 13, 2010), the U.S. Department of Justice issued a letter cataloging prison abuses, including the following example:

> John S. was being strip-searched prior to going to recreation. He was tapping on the wall. An officer ordered him to stop and hit him on top of the head. John continued to tap. After John was searched, the officer said: "You're f------ guilty" and slammed him on top of a cart and against the wall. John was pulled into the hallway where other officers started to beat him. He was hit in the face, dragged by his hair, choked, and beaten.[6]

Q. ***Hudson v. McMillian***

In *Hudson v. McMillian*, a correctional officer punched a shackled and handcuffed prisoner "in the mouth, eyes, chest, and stomach." 503 U.S. 1, 4 (1992). Another officer "held the inmate in place and kicked

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[6] Letter from Grace Chung Becker, Acting Assistant Attorney General, and Patrick J. Fitzgerald, U.S. Attorney, U.S. Dep't of Justice Civil Rights Div., to Todd H. Stroger, Cook County Bd. Pres., and Thomas Dart, Cook County Sheriff (July 11, 2008), at 13, https://www.justice.gov/sites/default/files/crt/legacy/2011/04/13/CookCountyJail_findingsletter_7-11-08.pdf.

and punched him from behind." *Id.* Meanwhile, their supervisor, "watched the beating but merely told the officers 'not to have too much fun.'" *Id.*

R. *Riker v. Gibbons*

Prior to the start of litigation in *Riker v. Gibbons*, No. 3:08-cv-0115 (D. Nev. filed Mar. 6, 2008), an expert concluded that medical treatment at a Nevada prison "amounts to the grossest possible medical malpractice, and the most shocking and callous disregard for human life and human suffering, that I have ever encountered in the medical profession in my thirty-five years of practice."[7] For example, Patrick Cavanaugh, a prisoner suffering from gangrene, "received almost no treatment for his illnesses, so his slow, painful death in the [prison's] infirmary was virtually assured. Given the profound and unmistakable smell of putrefying flesh, there can be no question that every medical provider and correctional officer in that infirmary was acutely aware of Patrick Cavanaugh's condition." *Id.* at 2.

S. *Valarie v. Michigan Dep't of Corrections*

Anthony McManus suffered from psychosis, including schizophrenia and bipolar disorder. *Valarie v. Michigan Dep't of Corr.*, No. 2:07-CV-5, 2009 WL 2232684, at *5 (W.D. Mich. July 22, 2009). He was locked in a Michigan prison that had no resources for

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[7] William Noel, *Review of Medical Records from Ely State Prison*, https://www.aclu.org/legal-document/expert-report-dr-noel-medical-care-ely-state-prison?redirect=cpredirect/33009 (last accessed Oct. 1, 2017).

treating psychiatric illnesses, *id.* at *1, where, over the course of four months, "[h]e received so little food and water" that he died in his cell of a combination of starvation and dehydration, *id.* at *18. When a "chemical agent" was applied to McManus in an effort to remove him from his cell, a nurse claimed that McManus was in "[n]o apparent distress," even though, as the court stated,

> video footage of the application of the chemical spray demonstrates a very emaciated, naked individual who appears to be in great discomfort, who is verbalizing in an incoherent manner, and who eventually makes repeated clear requests for water and help. *Mr. McManus' skeletal structure is clearly seen protruding from the skin.* During the taped footage, no one provides Mr. McManus with any water.

Id. at *4 (citations omitted) (emphasis added).

In an affidavit, an expert prison official stated that "[a]nimals in animal shelters are generally given more attention and better care than was afforded to McManus." *Id.* at *8.

T. *Cutter v. Wilkinson*

In *Cutter v. Wilkinson*, this Court noted that numerous violations of prisoners' religious freedoms could be found in the Congressional Record surrounding passage of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1. 544 U.S. 716 n.5 (2005). For example, "prisoners' religious possessions, 'such as the Bible, the Koran,

the Talmud or items needed by Native Americans[,] . . . were frequently treated with contempt and were confiscated, damaged or discarded' by prison officials." *Id.* (alteration in original) (citation omitted).

U. *Brown v. Plata*

In *Brown v. Plata*, this Court summarized cases of horrific medical and mental health abuse in California prisons. 563 U.S. 493, 502–06 (2011). For instance, the Court observed that suicidal prisoners were "held for prolonged periods in telephone-booth-sized cages without toilets[,]" and "[a] psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic." *Id.* at 503–04. According to a correctional officer, "in one prison, up to 50 sick inmates 'may be held together in a 12–by 20–foot cage for up to five hours awaiting treatment.'" *Id.* at 504. The Court also recognized instances in which prisoners had died following egregious delays in medical care, including "[a] prisoner with severe abdominal pain [who] died after a 5-week delay in referral to a specialist;" another prisoner "with 'constant and extreme' chest pain [who] died after an 8–hour delay in evaluation by a doctor;" and "a prisoner [who] died of testicular cancer after a 'failure of MDs to work up for cancer in a young man with 17 months of testicular pain.'" *Id.* at 505.

***

Men and women locked up in American prisons and jails too often suffer abominable mistreatment at

the hands of their jailers. Such conduct demands compensation and deterrence. A rule that categorically forbids the victims of such abuse from recovering more than 75% of their damages would weaken arbitrarily the important role of damages under § 1983 as a source of recompense for victims and a check against future misconduct.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Seventh Circuit should be reversed.

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In the Supreme Court of the United States

CHARLES MURPHY, PETITIONER

v.

ROBERT SMITH AND GREGORY FULK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF MICHIGAN, ARIZONA, ARKANSAS, CONNECTICUT, IDAHO, INDIANA, KANSAS, NEBRASKA, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, WISCONSIN, AND WYOMING IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The Prison Litigation Reform Act (PLRA) provides that, when a prisoner obtains a monetary judgment, "a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant," and that "the excess shall be paid by the defendant." 42 U.S.C. § 1997e(d)(2).

The question presented is whether § 1997e(d)(2) requires that the attorney's fee award be satisfied from the judgment, with the defendant liable for any fees in excess of 25 percent of the judgment.

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INTEREST OF AMICI CURIAE

As Congress recognized in enacting the Prison Litigation Reform Act, prisoner litigation against state officials is ubiquitous. While prisoners can obtain damages from state officials only in those officials' individual capacities and not directly from the State, the States frequently defend and indemnify those officials. Because it is often the States—and taxpayer dollars—that are responsible for any damages and associated awards of attorney's fees, the States have an interest in the proper interpretation of the PLRA's limitations on awards of attorney's fees. Specifically, § 1997e(d)(2) requires a prisoner who receives a money judgment to pay an award of attorney's fees in full up to the statutory cap of 25% of the judgment. 42 U.S.C. § 1997e(d)(2).

INTRODUCTION AND SUMMARY OF ARGUMENT

In the Prison Litigation Reform Act, Congress imposed a series of limits on the amount of attorney's fees a prisoner can recover for winning a civil-rights claim. In addition to limits on the total amount and hourly rate for which a losing defendant may be held responsible, and on the type and scope of legal work that may be reimbursed, Congress required a prisoner who wins a money judgment to pay the attorney's fees by applying "a portion" of his judgment to "satisfy" the fees. 42 U.S.C. § 1997e(d)(2).

The word "satisfy" denotes full payment, meaning the statute contemplates that the prisoner will pay the fees in full. But Congress also ensured that the required offset would not swallow a prisoner's victory.

It did so by putting a ceiling—"not to exceed 25 percent" of the judgment—on the amount the prisoner can be required to contribute. Thus, a prisoner is always guaranteed to keep at least 75% of his judgment, and more if his attorney's fees do not reach the statutory ceiling (for example, if 20% of the judgment would satisfy the fees).

This reading—that a prisoner must pay an award of attorney's fees in full up to the statutory cap of 25% of the judgment—is dictated by the statutory text. It gives meaning to Congress's command that a prisoner (in contrast to other civil-rights victors) "shall" contribute regardless of his prevailing status, and to Congress's choice of the word "satisfy." And it recognizes that the lower limit is automatically set by the amount of the judgment, just as all agree the upper limit is. The petitioner's reading, in contrast, allows courts to grant themselves discretion based on the fact that the plaintiff must pay a "portion" of the judgment—even though that portion is determined by math, not discretion—and in so doing to nullify Congress's decision that prisoners must satisfy the fees.

Reading the text to require the prisoner to pay up to the 25% cap is also consistent with the policies underlying the PLRA, which include bringing prisoners' litigation incentives in line with those of non-prisoners, in part by requiring prisoners to have a financial stake when they litigate, and limiting the costs that prisoner litigation imposes on defendants and taxpayers in both meritorious and non-meritorious suits.

ARGUMENT

I. Under § 1997e(d)(2)'s plain text, a prisoner who receives a money judgment must pay attorney's fees in full, so long as the fees do not exceed 25% of the judgment.

A. The words "shall" and "satisfy" denote a mandatory payment that is to extinguish and fulfill an award of fees.

Section 1997e(d)(2)'s text makes at least two points clear: (1) a prevailing prisoner *must* pay a portion of any attorney-fee award out of his judgment; and (2) the prisoner's contribution must *satisfy* the amount of the fee award up to 25% of the judgment.

First, the court *must* apply a portion of the prisoner's judgment to any award of attorney's fees. If the court awards a prevailing prisoner attorney's fees, the PLRA mandates that, in cases in which a prisoner receives a money judgment, "a portion of the judgment . . . *shall be applied*" to satisfy the fees. § 1997e(d)(2) (emphasis added). This language denotes a mandatory action—a "command" that "normally creates an obligation impervious to judicial discretion." *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001) ("The word 'shall' is ordinarily 'the language of command.' "). The PLRA does not merely *allow for* a portion of the judgment to be applied to satisfy the attorney's fees. Contra *Siggers-El* v. *Barlow*, 433 F. Supp. 2d 811, 822 (E.D. Mich. 2006) ("The relevant portion of the PLRA allows for a portion of the plaintiff's judgment, not exceeding 25%, to be applied to satisfy the payment of attorney's fees."). It *requires* the court to apply a portion of the judgment to the fees.

When Congress wants the courts to have discretion in shifting fees, it has said so expressly. As this Court has observed, "Congress has specifically provided in the statutes allowing awards of fees whether such awards are mandatory under particular conditions or whether the court's discretion governs." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 264 n.38 (1975). Indeed, Congress has expressly conferred discretion on courts in many statutes. E.g., 15 U.S.C. § 77k(e) ("[T]he court *may, in its discretion*, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and . . . such costs *may* be assessed in favor of [a prevailing] party litigant . . . if the court believes the suit or the defense to have been without merit . . . ."); 15 U.S.C. § 77www(a) ("[T]he court *may, in its discretion*, require an undertaking for the payment of the costs of such suit and assess reasonable costs, including reasonable attorneys' fees, against either party litigant, having due regard to the merits and good faith of the suit or defense."); 15 U.S.C. § 78i(f) ("[T]he court *may, in its discretion*, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant."); 15 U.S.C. § 78r(a) (same); 42 U.S.C. § 2000e-5(k) ("[T]he court, *in its discretion, may* allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs . . . ."); 42 U.S.C. § 7604(d) ("The court . . . *may* award costs of litigation (including reasonable attorney and expert witness fees) to any party, *whenever the court determines such award is appropriate.*"); 42 U.S.C. § 4911(d) (same) (all emphasis added).

But Congress did not include discretion-granting language in § 1997e(d)(2). In fact, § 1997e(d) provides particularly direct evidence that Congress chose not to grant discretion: § 1997e(d)(1) directly refers to § 1988, a provision that contains discretion-granting language, yet § 1997e(d) does not mirror § 1988's language. In § 1988, Congress expressly gave the courts discretion whether to shift fees: "the court, *in its discretion*, *may* allow the prevailing party . . . a reasonable attorney's fee[.]" § 1988(b) (emphasis added). That is, Congress read § 1988 when it was drafting the PLRA's fee-shifting statute and could easily have incorporated similar discretion-granting language into the PLRA, had it wanted to. But it did not. Cf. *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2165 (2015) (noting that Congress's choice of fee-shifting language in a statute was "particularly telling" in light of "other provisions of the Bankruptcy Code" that "expressly" shift fees in a different way). Instead, if fees "are authorized under section 1988," § 1997e(d)(1)—that is, if the prisoner is "the prevailing party" and the fees are "reasonable," § 1988(b)—then the prevailing prisoner must pay § 1997e(d)(2)'s mandatory fee-contribution.

The fact that Congress instructed courts to apply "a portion" of the judgment to satisfy an award of attorney's fees also does not imply that courts have discretion to define the amount of the portion. It makes sense that Congress chose an indeterminate word such as "portion" here. "Portion" is defined as "a part of a whole." THE AMERICAN HERITAGE DICTIONARY, SECOND COLLEGE EDITION (1982). Congress has required a prisoner to contribute "a part" of his whole judgment to an award of attorney's fees, but only a

part, as Congress has set the ceiling of the required contribution so that a prevailing prisoner is always guaranteed to keep at least 75% of any money judgment he receives (and possibly more, if the fees do not reach 25% of the judgment). The fact that the prisoner is required to contribute "a portion," or a part, of his judgment does not say anything about *the amount* of that part, or how it is to be determined. Instead, it simply reflects that the prisoner is not required to contribute his whole judgment.

Second, the prisoner's contribution must pay the fee award in full, up to the statutory ceiling of 25% of the judgment. That is because the PLRA requires the court to apply a portion of the prisoner's judgment "to satisfy" the amount of the attorney's fees. § 1997e(d)(2). The word "satisfy" denotes full payment. Black's Law Dictionary, for example, defines "satisfaction" in relevant part to mean to "extinguish" or "fulfill[ ]" a legal or moral obligation; for example, "the payment *in full* of a debt." BLACK'S LAW DICTIONARY (9th ed. 2009) (emphasis added). It similarly defines "satisfaction of judgment" as "[t]he *complete* discharge of obligations under a judgment," defines "satisfaction of lien" as "[t]he fulfillment of *all* obligations made the subject of a lien," and defines "satisfaction of mortgage" as "[t]he *complete* payment of a mortgage." *Id.* (emphasis added); accord THE SHORTER OXFORD ENGLISH DICTIONARY (3d ed. 1955) (defining "satisfy," with reference to a debt or obligation, as "[t]o pay off or discharge fully"; "[t]o pay"); THE AMERICAN HERITAGE DICTIONARY, SECOND COLLEGE EDITION (1982) (defining satisfy in relevant part as "[t]o discharge an obligation"). While it is true that Congress capped at 25% of the judgment the amount a prisoner

must contribute to fees, its use of the word "satisfy" indicates that, subject to that cap, a prisoner's judgment is to "extinguish," "fulfill[ ]," or "complete[ly] discharge" any attorney-fee award.

One more point confirms the mandatory nature of the plaintiff's contribution: there is no indication in the text that Congress intended to treat the *upper limit* on the plaintiff's contribution as *mandatory* while treating the *lower limit* as *discretionary*. All agree that the upper limit is mandatory—a plaintiff could not be required to pay more than 25% of the judgment to his attorneys. And nothing in the text treats the lower limit any differently. Rather, the lower limit is automatically set by the actual numbers of the judgment and the attorney's fees.

For example, if the prisoner wins a $100,000 judgment and is granted $20,000 in attorney's fees, then the "portion" of the judgment that will be applied to "satisfy" the amount of the fee award will be 20%, or $20,000. And where the fee award can be fully satisfied, as in this example, without requiring the plaintiff's payment to exceed 25%, there is no excess that needs to be paid by the defendant. If, on the other hand, the fees exceed 25% of the judgment—say the fees are $30,000 instead of $20,000—then the "portion" of the judgment that will be applied to "satisfy" the fees will be 25% of the judgment (the statutorily capped percentage), or $25,000, and the defendant will be responsible for "the excess" of $5,000.

As these examples show, the amount of the "portion" of the judgment that a plaintiff must pay is an automatic, mathematical function of the percentage that the fee award is of the judgment itself. This is

consistent with how the rest of § 1997e(d) works: just as the plaintiff's fee-contribution cap is a function of the amount of the judgment, § 1997e(d)(2) ("a portion of the judgment (not to exceed 25 percent)"), and just as the defendant's fee-contribution cap is a function of the amount of the judgment, § 1997e(d)(2) ("not greater than 150 percent of the judgment"), and just as the fees allowable in the first place are a function of the judgment, § 1997e(d)(1)(B)(i) (they must be "proportionally related to" it), it makes sense that the plaintiff's minimum contribution is also a function of the judgment. In short, both the upper limit *and* the lower limit are mandatory, not discretionary.

B. The words "exceed" and "excess" confirm that the prisoner is the first line of payment up to 25% of the judgment.

The words "exceed" and "excess" point to the same conclusion. Congress instructed that a prevailing prisoner's required contribution to a fee award is not to "exceed" 25% of the judgment, and then, in the next sentence, instructed that the defendant is to pay "the excess" (so long as the fees are not greater than 150% of the judgment). § 1997e(d)(2); BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "excess" as "[t]he amount or degree by which something is greater than another"). By choosing these words, Congress indicated that the defendant's obligation to pay "the excess" refers to the figure that the prisoner's fee contribution may not "exceed"—that is, to the amount exceeding 25% of the judgment. Up until that 25% point, the prisoner's judgment "shall" "satisfy" the fees.

Limiting the defendant's obligation to "the excess" shows Congress's intention that a prevailing prisoner

be the first line of payment for his own attorneys. After the court "satisf[ies]" the fee award with a portion of the judgment not exceeding 25%, the PLRA provides that the defendant shall pay "the excess" (up to 150% of the judgment). That is to say, a defendant's obligation to pay the attorney's fees does not kick in until after the prevailing plaintiff's initial contribution. Thus, the PLRA requires prisoner plaintiffs to remain the first line of payment for their attorneys, even when the court chooses under § 1988(b) and § 1997e(d) to require the losing defendant to pay the "excess" of the prisoner's attorney's fees that exceed 25% of the judgment.

And the prisoner may also be the *last* line of payment: If the fees exceed 150% of the judgment or otherwise exceed the limits § 1997e(d) sets on the type or hourly rate of work that may be reimbursed, the prisoner is free to pay his attorney the difference, so long as he uses his own money and not the defendant's. § 1997e(d)(4).

C. Requiring a prisoner to pay fees in full up to the statutory cap is necessary to give meaning to the words of the statute.

If courts have discretion to require a prisoner to contribute less than the full amount of his attorney's fees when the fees do not exceed 25% of the judgment, that necessarily means that a court could require the prisoner to contribute only a nominal, or *de minimis*, amount toward his fees. Indeed, that is exactly what a number of courts have done. E.g., *Boesing* v. *Spiess*, 540 F.3d 886, 892 (8th Cir. 2008) (applying 1% of prisoner's $25,000 judgment toward attorney's fees); *Johnson* v. *Daley*, 339 F.3d 582, 585 (7th Cir. 2003)

(en banc) (district court ordered prisoner to pay only $200 (or 0.005%) of $40,000 judgment toward fees); *Rodriguez* v. *Cty. of Los Angeles*, 96 F. Supp. 3d 1012, 1026 (C.D. Cal. 2014) (requiring prisoner to pay 1%); *Siggers-El*, 433 F. Supp. 2d at 822–23 (requiring prisoner to pay $1 from $219,000 judgment toward $90,875.95 fee award). Reading the PLRA this way nullifies the text of the statute in at least two ways.

First, it nullifies Congress's mandate that the court "shall" apply a portion of the judgment to "satisfy" the attorney's fees. A court has no discretion under the PLRA *not* to require a prisoner to pay a portion from his judgment to satisfy the fees—but that is effectively what courts do when they require a prevailing prisoner to contribute only a nominal amount of the judgment toward fees, such as 1% or $1. "Nominal" is defined in relevant part as "[e]xisting in name only," or "trifling, esp[ecially] as compared to what would be expected." BLACK'S LAW DICTIONARY (10th ed. 2014). Even courts that have read § 1997e(d)(2) as granting discretion to set the amount have understood that requiring only a nominal contribution does not "honor[ ] [Congress's] intent to hold the plaintiff responsible for a portion of the attorneys' fees awarded." *Farella* v. *Hockaday*, 304 F. Supp. 2d 1076, 1081 (C.D. Ill. 2004) (requiring prisoner to contribute 10% of judgment toward attorney's fees, noting that 10% is "more than a de minimis amount"). By allowing prevailing prisoners to make "trifling" contributions toward attorney's fees—contributions that "[e]xist[ ] in name only"—courts have nullified Congress's choice of the words "shall" and "satisfy."

Second, allowing a prisoner to contribute only a nominal amount nullifies Congress's instruction to treat prevailing prisoners *differently* than prevailing non-prisoners. Congress, through the PLRA, has expressed a judgment that, *in contrast to § 1988(b)*, a court *may not* pay a prevailing prisoner's attorney solely through funds of the defendant. § 1997e(d)(2). No corresponding provision in § 1988(b) requires a prevailing non-prisoner to pay a portion of his own attorney's fees. This shows that Congress wanted courts to treat prevailing prisoners differently than other prevailing plaintiffs under § 1988(b). This Court must presume that Congress intended this difference to be meaningful, *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (statutes construed to give effect to all provisions); *Stone* v. *INS*, 514 U.S. 386, 397 (1995) (Congress intends amendments to have "real and substantial effect")—but the difference evaporates if a court has discretion to require only a nominal contribution from the prisoner under § 1997e(d)(2).

D. In contrast to § 1988, which allows a plaintiff to pay no fees, § 1997e(d)(2) does not allow fully setting aside the American Rule.

The usual rule for litigation is this country is that "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Baker Botts*, 135 S. Ct. at 2164 (quoting *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53 (2010)). This "bedrock principle," known as the "American Rule," has deep roots in our common law. *Id.* at 2164, 2169. Accordingly, this Court "will not deviate from the American Rule absent explicit statutory au-

thority." *Id.* at 2164 (internal quotations omitted). Instead, this Court reads any fee-shifting statutes with a presumption favoring the American Rule that each litigant pays his own fees. *Baker Botts*, 135 S. Ct. at 2164.

While Congress has permitted full fee-shifting for prevailing civil-rights plaintiffs, it has forbidden full fee-shifting for prevailing prisoners. In civil-rights cases, Congress has given courts discretion to "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," with certain limited exceptions. § 1988(b). A party seeking attorney's fees must show (1) that it is a prevailing party, and (2) that the request is reasonable. *Farrar* v. *Hobby*, 506 U.S. 103, 109–14 (1992). In fact, the default expectation is that a prevailing civil-rights plaintiff *will* have attorney's fees shifted to the defendant: this Court has held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," reasoning that "[t]he purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (citations and quotations omitted). A prevailing defendant, in contrast, "may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Id.* at 429 n.2.

But for prisoner litigation, Congress created a different rule. Instead of expressly permitting full deviation from the American Rule, as it had in civil-rights cases generally, Congress in the PLRA placed a num-

ber of limits on the fees that courts may award to prevailing prisoner plaintiffs. § 1997e(d). As detailed in Part II.A, the PLRA limits the scope of legal work that may be reimbursed, § 1997e(d)(1); caps at 150% of the judgment the total amount a losing defendant can be required to pay, § 1997e(d)(2); and caps the hourly rate a defendant can be required to cover at no greater than 150% of the statutory hourly rate for court-appointed counsel, § 1997e(d)(3). Section §1997e(d)(2)'s limitation on fee shifting—i.e., requiring a prisoner who wins a money judgment to contribute to any attorney's fee award—is consistent with these other limits. Adopting the petitioner's interpretation, in contrast, would allow a court to award fees just as if the American Rule had been fully eliminated, by allowing a prisoner to shift all but a nominal amount onto the losing defendant.

II. The statutory context further confirms this reading.

Examining § 1997e(d)(2) in its statutory context further confirms that Congress expected prevailing prisoners to pay in full an award of attorney's fees up to the statutory cap of 25% of the judgment.

A. Multiple parts of § 1997e(d) *limit* the amount of attorney's fees for which a defendant may be held responsible.

The language requiring prisoners to put "a portion" of the judgment toward fees exists in a subsection that sets out a series of *limitations* on the amount a losing defendant can be required to contribute to the prisoner's attorney fees. Each part of subsection (d) limits the fees a defendant must pay:

- Subsection (d)(1) limits the type and scope of legal work that a defendant must reimburse, requiring the fee to be "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" and be either "proportionately related to the court ordered relief" or "directly and reasonably incurred" in enforcing the court-ordered relief.

- Subsection (d)(2) caps the total amount a defendant must reimburse, limiting an award of attorney's fees to 150% of the judgment.

- Subsection (d)(3) caps the hourly rate for which a defendant is responsible, specifying that an attorney's hourly rate can be no greater than 150% of the statutory hourly rate for court-appointed counsel.

- Subsection (d)(4) allows a prisoner to pay his attorney a higher fee than is permitted under Subsection (d), but only if he uses his own money and not the defendant's.

Within this subsection that imposes solely limitations on the amount of fees for which a losing defendant may be held responsible, subsection (d)(2) reads most naturally as requiring the prevailing prisoner to pay as much of his own fees as possible up to the statutory cap of 25% of the judgment. *Jackson* v. *Austin*, 267 F. Supp. 2d 1059, 1071 (D. Kan. 2003) (holding that this is the most plausible interpretation, "especially given the other limits that Section 1997e places on both prisoners and the courts"); *Searles* v. *Van Bebber*, 64 F. Supp. 2d 1033, 1042 (D. Kan. 1999) (same),

vacated and remanded on other grounds, 251 F.3d 869 (10th Cir. 2001).

B. The petitioner's proposed reading allows a form of double-counting.

Reading the PLRA to give courts discretion to set the amount of a prisoner's required fees contribution allows courts to treat prisoners the same as non-prisoners—it allows courts to use considerations that already factored into the amount of the *judgment* to also increase the percentage of *fees* that the defendant must pay, in spite of Congress's intent in the Prison Litigation Reform Act to treat prisoners differently from non-prisoners.

Consider, for example, a prisoner and a non-prisoner who won identical judgments for an identically severe civil-rights violation. The non-prisoner would "ordinarily recover" all of the fees, "unless special circumstances would render such an award unjust," *Hensley*, 461 U.S. at 429 (quotations omitted), which means the non-prisoner would pay 0% of the fees and the non-prisoner's defendant would pay 100% of the fees. But as explained above, § 1997e(d) shows that prisoners are supposed to be treated differently from non-prisoners, even after proving a constitutional violation. So if a court factors, for example, the egregiousness of the constitutional violation into the fee-shifting and allocates the fees on that basis, then the court effects a form of double-counting: it uses a factor already accounted for in the judgment (the egregiousness of the constitutional violation) to allocate fees, overriding Congress's decision to treat prisoners *and their judgments* differently.

Numerous courts have cited the severity of the constitutional violation or the existence of punitive damages as a reason to lower the prisoner's mandatory contribution under Section 1997e(d)(2). E.g., Pet. Br. 22–23 (collecting cases); *Siggers-El*, 433 F. Supp. 2d at 822–23; *Farella*, 304 F. Supp. 2d at 1081–82; *Morrison* v. *Davis*, 88 F. Supp. 2d 799, 811 (S.D. Ohio 2000); *Johnson* v. *Daley*, 117 F. Supp. 2d 889, 905 (W.D. Wis. 2000), rev'd, 339 F.3d 582 (7th Cir. 2003). But Congress presumably was well aware that the severity of the constitutional violation would be factored into the underlying judgment, including via punitive damages, yet Congress still chose to require the prevailing prisoner to contribute to his own legal fees, without qualification. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

Other factors might be double counted in a similar way. For example, the main reason to grant a prevailing plaintiff attorney's fees under § 1988(b) is that Congress intended the fee-shifting to encourage civil-rights enforcement: "[t]he purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley*, 461 U.S. at 429 (citations and quotations omitted); accord *Blanchard* v. *Bergeron*, 489 U.S. 87, 95 (1989) ("The intention of Congress was to encourage successful civil rights litigation . . . ."). But even though the existence of a civil-right violation is already included in the threshold calculus whether to award fees *at all* under § 1988(b), courts have relied *again* on the existence of a constitutional violation to lower the amount a prevailing prisoner will contribute to his fee award under § 1997e(d)(2). E.g., *Morrison*, 88 F. Supp. 2d at 811;

(considering among other factors "the constitutional rights implicated"), amended in part, 195 F. Supp. 2d 1019 (S.D. Ohio 2001); *Siggers-El*, 433 F. Supp. 2d at 822–23 (same); *Lawrence* v. *Bowersox*, No. 4:97-cv-1135-CEJ, Dkt. 204 (E.D. Mo. Oct. 2, 2002) (same); *Farella*, 304 F. Supp. 2d at 1081–82 (considering "the seriousness of the constitutional violation"); *Cornell* v. *Gubbles*, No. 05-1389, 2010 WL 3937597, at *2 (C.D. Ill. Sept. 29, 2010) (same); cf. *Kahle* v. *Leonard*, 563 F.3d 736, 743 (8th Cir. 2009) (importing standards used "for determining *whether* and to what extent a prevailing party should receive attorneys' fees in ERISA cases" (emphasis added)).

In other words, despite Congress's deliberate policy choice that even prisoners who genuinely suffered a constitutional violation must be required to satisfy their own fees with a portion of the judgment, the courts above have cited the existence of a constitutional violation as a reason to lower the amount the prisoner must contribute to fees under § 1997e(d)(2). This makes little sense, as literally every prisoner who receives an award of attorney's fees—and whom Congress, in the PLRA, has required to contribute to those fees—will have suffered a constitutional violation.

Courts have struggled expressly with the competing policy considerations at play. In *Livingston* v. *Lee*, 2007 WL 4440933 (N.D.N.Y. Dec. 17, 2007), for example, the court first noted that "[i]t would be somewhat incongruous for a court to effectively reduce the punitive effect of punitive damages by reducing the amount the wrongdoer otherwise has to pay by offsetting a portion of the punitive damages award against

the attorney's fees to be paid by the defendant." *Id.* at *2. On the other hand, the court recognized that "the clear purpose of § 1997e(d)(2) . . . is to compel the prisoner to bear some of the burden of the cost of litigation." *Id.* "Balancing these countervailing policy considerations," the court ultimately honored Congress's policy choice by requiring the prevailing prisoner to pay 25% of his judgment toward his attorney's fees. *Id.* In contrast, other courts have appeared to expressly reject Congress's policy choice. E.g., *Shatner* v. *Cowan*, 2009 WL 5210528, at *4 (S.D. Ill. Dec. 28, 2009) ("[T]he Court finds that requiring Sha[tn]er to pay more than a $1.00 would also defeat the purpose of awarding him compensatory and punitive damages.").

The courts' struggles with policy considerations highlight another quandary that arises when courts read the PLRA as providing discretion to set the prisoner's mandatory contribution to fees anywhere from one cent to 25% of the judgment. Unless the court assumes a default contribution of 25% and exercises its discretion only to reduce that percentage (which results in the double-counting described above), it is unclear what would motivate the court to exercise its discretion to require the prisoner to contribute a full 25% of the judgment toward fees—other than the simple policy conclusion that Congress wanted the prisoner to contribute. E.g., *Farella*, 304 F. Supp. 2d at 1081–82 (contribution of 10% "honor[s] [Congress's] intent to hold the plaintiff responsible for a portion" of the fees); *Livingston*, 2007 WL 4440933, at *2 (similar); cf. *Shepherd* v. *Wenderlich*, 746 F. Supp. 2d 430, 433 (N.D.N.Y. 2010) (requiring prisoner to contribute 10% of judgment "[f]or purposes of simplicity"); *Clark* v.

Phillips, 965 F. Supp. 331, 338 (N.D.N.Y. 1997) (requiring prisoner to contribute 25% due to lack of objection); *Gevas* v. *Harrington*, No. 10-CV-493-SCW, 2014 WL 4627616, at *3 (S.D. Ill. Sept. 16, 2014) (requiring prisoner to contribute 10% in part because prisoner benefitted from counsel); *Jellis* v. *Veath*, No. 3:10-CV-91-DGW, 2013 WL 1689061, at *2 (S.D. Ill. Apr. 18, 2013) (same, requiring 5% contribution). But see *Hall* v. *Terrell*, 648 F. Supp. 2d 1229, 1237 (D. Colo. 2009) (considering defendant's ability to pay fees); *Kemp* v. *Webster*, No. CV 09-295-KHV, 2013 WL 6068344, at *5 (D. Colo. Nov. 18, 2013) (same); Pet. Br. 23 n.3 (acknowledging that other factors considered in *Hall* and *Kemp* "are just different ways of restating" a culpability assessment). Indeed, many courts that have required a prevailing prisoner to cover the full fee award up to 25% of the judgment have thought that they had no discretion under § 1997e(d)(2) to require a lesser amount, or at least have not indicated a belief that they had discretion. E.g., App. 1a; *Johnson*, 339 F.3d at 584–85; *Jackson*, 267 F. Supp. 2d at 1071–72; *Spruytte* v. *Hoffner*, 197 F. Supp. 2d 931, 934 (W.D. Mich. 2001); *Searles*, 64 F. Supp. 2d at 1042, vacated and remanded on other grounds, 251 F.3d 869 (10th Cir. 2001); *Beckford* v. *Irvin*, 60 F. Supp. 2d 85, 89–90 (W.D.N.Y. 1999); *Roberson* v. *Brassell*, 29 F. Supp. 2d 346, 355 (S.D. Tex. 1998).

If the court wanted to exercise its discretion to require the prisoner to pay 25% for some reason other than Congress's policy choice to require a prevailing prisoner to contribute—say based on bad behavior or litigation decisions by the prisoner plaintiff, or the fact that the prisoner won only a fraction of the relief

he sought—then many such reasons would probably also be reasons to deny fee-shifting altogether under § 1988(b).

III. The PLRA's policy supports this plain-text reading.

The PLRA's policy also supports requiring prevailing prisoners to satisfy any award of attorney's fees up to the statutory cap of 25% of the judgment. In particular, through the PLRA Congress sought to bring prisoners' litigation incentives in line with those of non-prisoners, in part by requiring prisoners to have a financial stake in the litigation, and to limit the costs that prisoner litigation—both frivolous *and* meritorious—imposes on defendants and taxpayers.

Congress enacted the PLRA to bring prisoner litigation "under control" "in the wake of a sharp rise in prisoner litigation in the federal courts." *Woodford* v. *Ngo*, 548 U.S. 81, 84 (2006). As courts have noted, "the very nature of incarceration" had "fostered a 'nothing to lose and everything to gain' environment" in which inmates "indiscriminately [ ] file suit at taxpayers' expense." *Nicholas* v. *Tucker*, 114 F.3d 17, 20–21 (2d Cir. 1997). That is because "prisoners have substantial free time on their hands, their basic living expenses are paid by the state[,] and they are provided free of charge the essential resources needed to file actions and appeals, such as paper, pens, envelopes and legal materials." *Id.*; accord *Boivin* v. *Black*, 225 F.3d 36, 44 (1st Cir. 2000); *Johnson*, 339 F.3d at 592.

To control the inordinate amount of prisoner suits, many of which were meritless, Congress sought to bring prisoners' litigation incentives more in line with

the incentives that non-prisoners face. *Nicholas*, 114 F.3d at 20–21. One way to do that is to require prisoners to have a financial stake in the litigation. "By making prisoners at least partially responsible for the costs of their suits, the Act undoubtedly will discourage frivolous filings." *Id.* Prisoners "have to make the same decision that law-abiding Americans must make: Is the lawsuit worth the price?" *Id.* (quoting Senator Kyl).

Several PLRA provisions require prisoners to have a financial stake in the case. For example, one PLRA provision requires prisoners (even those bringing meritorious claims) to pay court filing fees in full, either up front or in monthly installments (for *in forma pauperis* prisoners). 28 U.S.C. § 1915(b).

And, as relevant here, the PLRA requires prisoners to have a financial stake by capping the attorney's fees they may recover from defendants, if successful, and by requiring them to bear their own attorney's fees with a portion of the judgment. 42 U.S.C. § 1997e(d). As multiple courts have noted, Congress's policy decision to limit attorney's fees even for successful prisoners with meritorious claims makes sense: it "forces both lawyer and client, out of self-interest, to assess likely outcomes with greater care before filing a suit that, even if nominally successful, might leave them holding a nearly empty bag." *Boivin*, 225 F.3d at 45. Making prisoners aware ex ante that they will be required to contribute a portion of any judgment to their own attorney's fees "may create a disincentive to filing lawsuits in general and frivolous lawsuits in particular." *Collins* v. *Algarin*, No. CIV. A. 95-4220, 1998 WL 10234, at *9 (E.D. Pa. Jan. 9, 1998); accord

Morrison, 88 F. Supp. 2d at 808 ("Filing fees and attorney fees are both elements of the calculus that any potential litigant undertakes in deciding whether litigation is worth the economic risk."); *Johnson*, 339 F.3d at 594 (explaining why "a law reducing fees in successful suits also affects the filing of weak claims").

Section 1997e(d)(2)'s text requiring a prevailing prisoner to "satisfy"—i.e., pay in full—any award of attorney's fees up to a statutory cap is in full accord with this policy. It requires the prisoner to evaluate the cost, telling him that if he incurs high legal fees, he will need to satisfy them with not more than 25% of his judgment. In contrast, giving courts discretion to require only a nominal attorney's-fee contribution from the prevailing prisoner dilutes that disciplining effect.

Requiring a prisoner to bear his own costs is related to another policy goal of the PLRA, which is to limit the costs that prisoner litigation imposes on defendants and taxpayers. This goal is reflected in numerous PLRA provisions, which reduce costs even for *meritorious* claims. For example, the PLRA:

- Requires exhaustion of administrative remedies, 42 U.S.C. § 1997e(a);

- Allows defendants to waive the right to reply to a complaint without admitting to its allegations, 42 U.S.C. § 1997e(g);

- Requires, to the extent practicable, pretrial proceedings to be conducted by telephone, video conference, or other technology without

removing the prisoner from confinement, 42 U.S.C. § 1997e(f);

- Prohibits recovery for mental or emotional injury in the absence of physical injury or a sexual act, 42 U.S.C. § 1997e(e), 28 U.S.C. § 1346(b);

- Limits prospective relief and preliminary injunctions that can be awarded ("no further than necessary to correct the violation"), 18 U.S.C. § 3626(a)(1)(A); *id.* § 3626(a)(2);

- Provides for an "automatic stay" in response to a motion to terminate expensive remedial actions, 18 U.S.C. § 3626(e)(2);

- Limits the permissible scope of consent decrees, 18 U.S.C. § 3626(c);

- Provides for the appointment of special masters, 18 U.S.C. § 3626(f);

- Precludes the discharge of a prisoner's court fees in bankruptcy, 11 U.S.C. § 523(a)(17).

Requiring a prevailing prisoner to "satisfy" an award of attorney's fees up to 25% of his judgment furthers this policy goal of limiting the costs that prisoner litigation imposes on defendants and taxpayers. And a defendant's losing status—and the prisoner's winning status—did not change Congress's calculus in this regard: all of the limitations that Congress imposed on attorney's fees in Section 1997e(d) (e.g., limiting a defendant's responsibility to 150% of the judg-

ment, to 150% of the statutory hourly rate for appointed counsel, and to fees "directly and reasonably incurred in proving an actual violation") apply to *prevailing* prisoners and *losing* defendants. In this broader policy context of the PLRA, it makes sense that Congress would require a prevailing prisoner to "satisfy" his own attorney's fees, up to a statutory cap that preserves the bulk of his money judgment.

CONCLUSION

For the reasons stated above, this Court should affirm the judgment of the Seventh Circuit.

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